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LOUIS H. WARD	San Francisco
A. F. BRAY[2]	San Francisco

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Division 2

Presiding Justice

MINOR MOORE	Los Angeles

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EMMET H. WILSON	Los Angeles

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[1] Died Jan. 16, 1947.

[2] Appointed, took office Feb. 11, 1947.

DISTRICT COURTS OF APPEALS—Cont'd.

Division 3

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WALTER DESMOND	Los Angeles

Associate Justices

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Clerk

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Judges

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RAYMOND T. COUGHLIN	Sacramento

Attorney General

Fred N. Howser[3]	Los Angeles

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[1] Term expired Dec. 31, 1946.
[2] Appointed, took office Jan. 1, 1947.
[3] Became Attorney General Jan. 6, 1947.

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CALIFORNIA REPORTER

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SECOND SERIES

29 Cal.2d 87

PEOPLE v. KOENIG et al.

Cr. 4714.

Supreme Court of California, in Bank.
Sept. 30, 1946.

1. Criminal law 🔑516

A "confession" is an admission of guilt, a fact in dispute.

See Words and Phrases, Permanent Edition, for all other definitions of "Confession".

2. Criminal law 🔑516

Under statute defining indirect evidence, the testimony of a witness that defendant admitted guilt would be "direct evidence" that an admission or confession was made by defendant, but "circumstantial evidence" of the truth of what was admitted. Code Civ.Proc. § 1832.

See Words and Phrases, Permanent Edition, for all other definitions of "Circumstantial Evidence" and "Direct Evidence".

3. Criminal law 🔑552(4)

Circumstantial evidence is as adequate to convict as direct evidence.

4. Criminal law 🔑824(5)

Where circumstantial evidence is substantially relied upon for proof of guilt, trial judge has duty, on his own motion, to include in the instruction a statement that to justify a conviction, the facts must not only be consistent with the theory of guilt, but be inconsistent with any other rational conclusion.

5. Criminal law 🔑784(1), 1173(2)

In prosecution for robbery while armed, based on circumstantial evidence, refusal of requested instruction that to justify conviction facts must not only be consistent with theory of guilt, but must be inconsistent with any other rational conclusion, was improper, but did not constitute reversible error under the facts.

6. Criminal law 🔑406(1)

In prosecution for robbery while armed, police officers' testimony as to defendant's incriminatory admission was properly received, notwithstanding that there were certain inconsistencies between testimony of the officers in regard to who was present when statements were allegedly made by defendant.

7. Criminal law 🔑824(5)

Where prosecution relied substantially on evidence of defendant's alleged oral confessions of crime charged, instruction to view with caution evidence of his oral admission should have been given jury even in absence of request therefor by defendant, but failure to do so was not prejudicial error, where it was improbable in view of the record that a different verdict would have resulted. Code Civ.Proc. § 2061.

8. Criminal law 🔑829(11)

Failure to admonish jury at time of reading a written statement signed by a codefendant containing matters that tended to implicate defendant that statement was limited in its application solely to codefendant did not constitute prejudicial error, where trial court had previously so instructed jury.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Donald Edgar Koenig and William Richter were convicted of robbery while armed with a revolver, and the defendant Richter appeals.

Affirmed.

Prior opinion, 164 P.2d 923.

Leola Buck Kellogg and Montgomery G. Rice, both of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Appellants William Richter, Donald Koenig and Ralph Hagenios were jointly charged with two counts of robbery while armed with a revolver. Defendant Hagenios pleaded guilty. Appellant Richter and defendant Koenig were tried by a jury and convicted. They appealed from the judgment and from orders denying their motions for a new trial. Koenig failed to perfect his appeal, and it was dismissed.

Shortly after midnight of May 21, 1944, defendant Hagenios, armed with a .38 caliber revolver, entered a cafe in West Los Angeles and robbed the proprietor and a customer who was cashing a pay check. According to the testimony of a witness, Hagenios escaped from the scene in a green convertible car, which was immediately driven away as he stepped into it from the right side. This witness was unable to see the driver of the car. There was no eyewitness testimony at the trial linking appellant Richter with the robbery.

Richter and Hagenios were employed by the Veterans Administration in West Los Angeles, Richter was chief cook, and Hagenios worked under his supervision. The proprietor of the restaurant had been cashing pay checks for 10 years and kept money on hand for this purpose. Two years before the robbery appellant had lived next door to this restaurant for six months.

On May 22, 1944, appellants Richter and Hagenios were arrested in a hotel room in Ocean Park, California, where they were registered under fictitious names after their return from San Francisco together on May 19th. It was not established whether appellant knew that they were so registered. At this time appellant had a home in Los Angeles with his wife, who was out of town at the time of the robbery. At the time of the arrest, the police found in the hotel room, forty-nine .38 caliber cartridges and a cartridge box that had contained fifty cartridges. At the time of the robbery, Hagenios fired one shot that lodged in the wall of the cafe.

The victim of the robbery testified that Hagenios took $1,915, including the amount of the customer's pay check. When Hagenios and Richter were arrested they had $232 and $278, respectively, on their persons.

Police Officer Subers testified that he was one of the arresting officers and that when the cartridges were found in the hotel room, Hagenios told him that they were his, and that appellant at that time denied any knowledge of the robbery and stated that the $278 in his possession was derived from a sale of his automobile and a loan of $100, both negotiated before his trip to San Francisco, and $90 he won there on the races. Subers also testified that appellant and Hagenios were lodged in the West Los Angeles jail, where on the night of May 23d he had a conversation with the two prisoners and that during this conversation Police Officer Ward was present and that during the last part of the conversation Police Officer King was present.

Subers testified that in the course of this conversation he advised the defendants that he had a good case against them and asked if they would plead guilty. He also requested their cooperation in recovering the rest of the money. At this point, according to the witness, Hagenios denied getting more than $780, which included the money in appellant's and Hagenios' possession, $220 that had been given to Koenig, and money that had been spent. Appellant stated that "That was all they had gotten." The witness testified that Richter also said that he had given "Koenig $120 as his share of the job" and that "they [Hagenios and Richter] had picked" up the car used in the robbery "at a drive-in place at Wilshire and Santa Monica Boulevard"; that appellant said that he drove the car and abandoned it after the robbery one block east of St. John's Hospital in Santa Monica.

Police Officer Subers also testified to a later conversation at which Richter, Hagenios, Koenig, Officer King, and he were present. He asked defendant Koenig if he was sure that the $220 received from the other defendants was just a loan and appellant "spoke up and said, 'I gave you $120.00 and it wasn't a loan.'"

Police Officer King testified that he did not recall the first conversation to which Subers had testified, but that he was present at the second conversation after Koenig was brought in. He stated that he asked Koenig and Hagenios to "tell us about the robbery and Hagenios spoke up and said that all three were involved in the robbery, and that Richter had driven the car * * *"; that Richter at first denied this "and then Hagenios said, 'You are into this as well as we are, and we are not going to take the rap for this alone; * * *.'" At this point, according to the witness, appellant admitted that he drove the car. The rest of Officer King's testimony so far as it related to Richter, concerned the latter's description of the car as a green convertible and his admissions that he knowingly participated in the robbery, which the three of them had planned. The admissions as to the acquisition and disposition of the car were substantially the same as those Subers testified were made at the first conversation.

Police Officer Ward was not called to testify. Police Officer Burham testified that he received instructions on the night of May 23d to look for an automobile one block east of St. John's Hospital, and that he and his partner went to that location and found a 1937 La Salle green convertible that was on their list of stolen cars.

Appellant testified that the money in his possession at the time of his arrest was what remained after his San Francisco trip of the money received from the sale of his car, a $100 loan, and $70 that he won in San Francisco on the races. He denied admitting guilt or making the statements attributed to him by Officers King and Subers and stated that he heard of the robbery for the first time when he was arrested.

[1-3] Appellant contends that all the evidence against him was circumstantial and that the trial court failed properly to instruct the jury with regard to circumstantial evidence. Whether all the evidence was circumstantial depends on whether the testimony as to appellant's admissions was direct or circumstantial evidence. In other jurisdictions evidence of oral confessions is direct and not circumstantial evidence. See 40 A.L.R. 571; note L.R.A.1917D 595 and 73 U.Pa.L. Rev. 317; Underhill Criminal Evidence, 4th Ed., 1935, § 4. Research has failed to reveal any case holding otherwise, except Damas v. People, 62 Colo. 418, 163 P. 289, L.R.A.1917D, 591, which was expressly overruled in Mitchell v. People, 76 Colo. 346, 232 P. 685, 40 A.L.R. 566. Section 1832 of the Code of Civil Procedure, however, defines indirect evidence as "* * * that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For example: a witness proves an admission of the party to the fact in dispute. This proves a fact, from which the fact in dispute is inferred." A confession is an admission of guilt (People v. Connelly, 195 Cal. 584, 234 P. 374), a fact in dispute. Under the statute, the testimony of a witness that the defendant admitted guilt would seem to be direct evidence that an admission or confession was made by defendant but circumstantial evidence of the truth of what was admitted. Whether or not all evidence of oral confessions or admissions must be considered as circumstantial evidence under section 1832, we will assume, for the purpose of this case, that all of the evidence against appellant was circumstantial. That assumption does not lessen the weight of the evidence, for circumstantial evidence is as adequate to convict as direct evidence. People v. Latona, 2 Cal.2d 714, 43 P.2d 260; 1 Jones, Commentaries on Evidence, 16-25; 2 Wharton, Criminal Evidence, § 926.

[4, 5] The trial court instructed the jury that "There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct evidence, which is the direct testimony of any eyewitness. Such evidence may consist of any act,

declarations or circumstances admitted in evidence tending to prove the crime charged or tending to connect the defendant with the commission of the crime.

"If upon consideration of the whole case you are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of a defendant, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence. The law makes no distinction between circumstantial evidence and direct evidence in the degree of proof required for conviction but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both."

The judge also instructed the jury that, "If the evidence in this case as to any particular count, is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of a defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of such defendant's innocence, and reject that which points to his guilt." Appellant makes no objection to the general instruction but contends that the special instruction on evidence susceptible of two interpretations was not complete and that the trial court erred in refusing to give an instruction offered by appellant. The requested instruction read, "In order that a jury may be warranted in finding a defendant guilty on circumstantial evidence, all the facts and circumstances necessary to establish the conclusion of guilt must be proved beyond all reasonable doubt, all such facts and circumstances must be consistent with each other and with the conclusion sought to be established, which is that the person on trial committed the crime as charged. All such facts and circumstances, must be inconsistent with any reasonable theory of the innocence of the defendant, William Richter, and such facts and circumstances, taken all together, must be of such conclusive and satisfactory nature as to produce in the minds of the jurors a reasonable and moral certainty that the person on trial William Richter, and not some other person, committed the offense charged."

The requested instruction was improperly refused. In People v. Bender, 27 Cal.2d 164, 163 P.2d 8, the defendant was convicted on circumstantial evidence alone under an instruction substantially identical with the one given in the present case. It was there held (27 Cal.2d at page 175, 163 P.2d 15) to be the duty of the trial judge, on his own motion, to include in the instruction a statement that "* * * to justify a conviction, the facts or circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion." Such an instruction is required by the weight of authority if all the evidence is circumstantial. See State v. Johnson, 37 N.M. 280, 21 P.2d 813, 89 A.L.R. 1378. Although the requested instruction deals with other matters, it properly states the principle of the interpretation of circumstantial evidence. The statement that the jury must find that "William Richter, and not some other person, committed the offense charged" might have been left out. There were adequate instructions on the nature of the offense, however, and the jury could not have been confused by this statement.

The failure either to give the requested instruction or to include in the instruction given a proper statement of the principle that the evidence must be inconsistent with any other rational hypothesis was error. It does not follow, however, that error in this regard necessarily requires reversal of the trial court. In the Bender case, it was held that the failure to give a complete instruction was not prejudicial under the facts in that case. Similarly in the present case such failure was not prejudicial. It is true that in People v. Rayol, 65 Cal.App.2d 462, 150 P.2d 812, the court held that the failure to give the complete instruction was prejudicial, but a conviction in that case involved the state's proving that the defendant knew that she had participated in an act of sodomy although she was under the influence of intoxicating liquor at the time, and the evidence was confined almost entirely to her participation. The jury could reasonably have concluded that defendant was not a knowing participant in the act. In People v. Hatchett, 63 Cal. App.2d 144, 146 P.2d 469, the court also held that the failure to give the complete instruction was error but it did not reverse on this error alone but on this error and several other errors that were substantial.

[6] Appellant contends that the testimony of the two police officers was so contradictory as to be unreliable, and that the other evidence, under the circumstances, was insufficient to sustain the conviction. It is true that there were certain inconsistencies between the testimony of the two officers in regard to who was present at the two conversations and as to whether certain statements were made by appellant at one time or another but these discrepancies were not substantial. As to the admissions that they testified were made by appellant, the two witnesses were in accord. Certainly it is no ground to disregard such testimony that one or the other may have incorrectly recalled the time when the alleged statements were made.

[7] Section 2061 of the Code of Civil Procedure, subsection 4, provides that on all proper occasions the jury is to be instructed "That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution." No such cautionary instruction was given by the trial judge nor was one requested. It was formerly the rule that even the refusal to give such an instruction was not error on the ground that the instruction amounted to a mere commonplace statement of what every jury was believed to know. People v. Raber, 168 Cal. 316, 143 P. 317. Later the code section was held unconstitutional as authorizing comment on the evidence. Hirshfeld v. Dana, 193 Cal. 142, 223 P. 451. In People v. Dail, 22 Cal.2d 642, 140 P.2d 828, the Hirshfeld case was overruled, and it was held that the section was never unconstitutional. In the Dail case an instruction was given directly contrary to the section with respect to the testimony of accomplices. No admissions were involved. In Conger v. White, 69 Cal.App.2d 28, 158 P. 2d 415, such an instruction with respect to admissions was requested and refused. The court held this refusal to be prejudicial error in view of the equivocal nature of the admissions relied upon. The admissions in the instant case, if true, were far from equivocal. In view of the code section, however, such a cautionary instruction should have been given. In view of the record in this case, however, it is improbable that had this instruction been given, the jury would have discounted this testimony to such an extent that it would have returned a different verdict.

[8] Appellant contends that a written statement signed by codefendant Koenig containing matters that tended to implicate appellant was received in evidence without the trial court's properly limiting its application solely to Koenig. The record shows, however, that when Police Officer Subers was testifying with regard to a conversation with Koenig, the court, at the suggestion of appellant's counsel, admonished the jury that it could consider this conversation only as affecting Koenig. Later this statement was read to the jury without further admonition, and none was requested. At the close of the People's case, the statement was offered in evidence as an exhibit solely against Koenig. The trial court instructed the jury that "Any statement you may find to have been made by any defendant after the commission of a crime, if you find a crime to have been committed, may be considered by you as evidence affecting, if it does affect, only the defendant who may have made such statement and not as affecting any other defendant." Under these circumstances no substantial error resulted from the failure to admonish the jury again at the time of the reading of the statement.

The jury was fully instructed as to reasonable doubt and in regard to the credibility of witnesses in general and was told, in effect, that it must bring in a verdict of not guilty if there was any reasonable interpretation of the evidence that pointed to innocence. After careful examination of the record, we must conclude that the errors either alone or in combination, did not interfere with the substantial rights of the appellant or result in a miscarriage of justice.

The judgment and order are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concurred.

29 Cal.2d 110

TANNER et al. v. OLDS.

ESCROW-DEPOSITARY CORPORATION v. SAME et al.

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. SAME et al.

L. A. 19460, 19467, 19472.

Supreme Court of California, in Bank.
Oct. 1, 1946.

Dissenting Opinion Oct. 7, 1946.

1. Mines and minerals 🔑79(1)

The execution by several landowners of a community oil lease providing that each should share benefits thereunder in proportion to acreage owned by each, constituted the landowners "joint owners" or "tenants in common" of all the royalties reserved.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Owner" and "Tenant in Common".

2. Mines and minerals 🔑79(1)

Under community oil lease providing that each of the co-lessors should share benefits thereunder in proportion to acreage owned by each, the one-ninth royalty interest of a co-lessor in the community wells was an "estate in real property", an "incorporeal hereditament" analogous to the right to receive future rents.

See Words and Phrases, Permanent Edition, for all other definitions of "Estate in Real Property" and "Incorporeal Hereditament".

3. Mines and minerals 🔑79(1)

A cotenant under a community oil lease may not commit waste of the common estate. Code Civ.Proc. § 732.

4. Mines and minerals 🔑79(1)

A co-lessor under a community oil lease, by producing oil from his own land which had originally been subject to the lease and thereafter excluded, was not committing "waste" of the community production because wells drained from a common pool and co-lessor's well lessened profits of the community wells. Code Civ. Proc. § 732.

See Words and Phrases, Permanent Edition, for all other definitions of "Waste".

5. Mines and minerals 🔑79(1)

The royalty interest of a co-lessor of oil produced under a community oil lease was not forfeited by reason of fact that after land owned by him and originally subject to the lease was excluded therefrom by quitclaim deed, he produced oil on his land and thereby diminished production of the community wells, where the quitclaim deed excluding his land from the lease contained no provision prohibiting production thereon. Code Civ.Proc. § 732.

EDMONDS, J., dissenting.

Appeals from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action to quiet title by Emma Tanner and another against Emma F. Olds, wherein the Escrow-Depositary Corporation and the Security-First National Bank of Los Angeles, a national banking association, instituted separate interpleader actions joining Emma F. Olds and Emma Tanner and another as defendants. The interpleader actions and the quiet title action were consolidated for trial. From the judgments, Emma Tanner and another appealed. By stipulation the parties agreed that the appeals should be considered together.

Affirmed.

Prior opinion, 166 P.2d 366.

James M. Carter, Burke, Hickson, Burke & Marshall, and Daniel G. Marshall, all of Los Angeles, for appellants.

Cree & Brooks, of Long Beach, for respondent.

SCHAUER, Justice.

The problem presented by this appeal (from a judgment in a quiet title suit) is whether the royalty interest of a colessor in oil produced under a community oil lease is forfeited by reason of the fact that after land owned by him and originally subject to the lease was excluded therefrom, he produced oil on his land and thereby diminished the production of the community wells. For the reasons hereinafter stated, we have concluded that the trial court's determination in favor of such colessor must be sustained.

Certain of the issues here involved have been previously passed upon by this court (Tanner v. Title Ins. & Trust Co. (1942), 20 Cal.2d 814, 129 P.2d 383). As stated in our opinion on that appeal each of the parties, or his predecessor in interest, in 1921 joined as lessor with others in a community oil lease to Standard Oil Company as lessee of nine contiguous 5-acre lots in Montebello. The lots are numbered 168 to 176, both inclusive. The lease provides, among other things, that "Lessors agree to, and they do hereby, pool their interest in this lease, and agree that during the continuance of this lease each owner of land subject thereto shall share in all benefits accruing to the whole lease in the ratio which the acreage owned by said Lessors bears to the entire acreage leased. This provision as to apportionment of benefits to be operative, notwithstanding the surrender by the Lessee of any land described herein." The lessee drilled two wells, one on lot 174 and the other on lot 176, and each well has produced oil in paying quantities for some years. Lots 174 and 176 are owned by plaintiff Tanner and plaintiff Hunt, respectively.

On June 1, 1933, the lessee joined with the owners of the nine lots in executing a written agreement by which all of the lots except numbers 174 and 176 were quitclaimed and released from the community lease to their respective owners. On June 30, 1937, such owners secured a decree, which is now final, quieting their several titles against plaintiffs Tanner and Hunt. In the latter part of 1937 defendant, Emma F. Olds and her husband, who had joined in the community lease as owners and lessors of lot 173, leased that lot to the Bush Oil Company and in 1939 began receiving royalties on oil produced therefrom. No part of those royalties has been shared with plaintiffs. Mr. Olds died in 1944 and Mrs. Olds is now the sole owner of lot 173 and of the rights formerly held by her and her husband in the community wells. The Bush wells were not slant drilled or whipstocked, but were bottomed entirely on the Olds property.

Until approximately September, 1938, the owners of the nine lots originally covered by the community lease shared equally in the landowners' royalties accruing under the terms of the lease from the wells on lots 174 and 176. Shortly before that time plaintiffs Tanner and Hunt asserted that they alone were entitled to such royalties. Thereupon they brought this action to quiet title thereto and the trial court originally entered judgment in their favor. That judgment was reversed upon defendants' appeal.

In our decision upon the former appeal (Tanner v. Title Ins. & Trust Co. (1942), supra, 20 Cal.2d 814, 823, 129 P.2d 383, 388), we held upon the record then presented, that the owners of the seven surrendered lots "have the right to participate in all royalties payable under the lease." Concerning the one-ninth royalty share of Mr. and Mrs. Olds, the owners of the producing lot 173, we stated, however, 120 Cal.2d at pages 824, 825, 129 P.2d at page 389, that "courts have frequently considered implied covenants as being within a contract but such covenants are justified only when they are not inconsistent with some express term of the contract and in the absence of such implied terms, the contract could not be effectively performed. [Citations.] But the facts of the present case do not show any basis for implying a covenant in the lease which would have the effect of dividing the royalty provided for in it differently than the parties have agreed upon by the plain terms of their contract.

"The respondents [Tanner and Hunt, appellants herein] would be in an entirely different position if their suit was based upon pleadings and proof that the * * * Olds, by the production of oil on their land, are draining oil from the pool tapped by the wells on lots 174 and 176, and are thus impeding the full performance of the community lease.

"Every contract contains an implied covenant on the part of each party not to prevent or hinder performance by the other party. [Citation.] Upon fundamental principles the law will not allow one to claim royalties under a community lease and at the same time diminish the amount of oil which might otherwise be recovered for the common benefit of all the lessors.

"For example, in Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 73 P.2d 1163, the defendant leased plaintiff's oil property and also acquired a lease on adjacent land upon which it drilled wells thereby draining oil from the plaintiff's land. The lease with the plaintiff contained no offset clause. Nevertheless, the court held that a covenant would be implied obligating the lessee to drill wells to offset those on the adjacent property.

"In the present case, however, no evidence was offered to show that the well on the land of the Olds is draining oil from the source of supply under the community lease, and contrary to the contention of the respondents, this court may not take judicial notice of any such alleged fact."

After the remittitur went down appellants Beaty, as the successor of the original lessors of the westerly one-half of lots 171 and 172, intervened as the owners of a one-ninth lessor's royalty interest in the community wells. When the case was tried for the second time the pleadings of all appellants (plaintiffs, and intervenors Beaty) had been amended so as to allege, in effect, that the wells drilled by the Bush Oil Company on Mrs. Olds' lot 173 drained oil from the common pool tapped by the community wells on lots 174 and 176, and thus impeded the full performance of the community lease. (Escrow-Depositary Corporation v. Olds (L.A. 19467) and Security-First National Bank of Los Angeles v. Tanner (L.A. 19472) are interpleader actions involving the same question as that presented in the quiet title action, and are actions in which the monies to be awarded upon final judgment consist of the disputed one-ninth community lease royalties due to the Olds by the terms of the lease. The three cases were tried together, and the court entered judgments decreeing, in substance, that defendant Olds was entitled to her one-ninth share of the community lease production despite the fact that her independent production on lot 173 from its inception in May, 1939, drained the common pool tapped by the community wells and her own well to such an extent that had it not been for the production on lot 173 the community wells would have produced 15 per cent more.

These appeals are from the judgment in each of the three cases, and are before us upon a record consisting in whole of an agreed statement (Rules on Appeal, rule 6) which, so far as concerns the pleadings before the court on the second trial, recites only that, as hereinabove stated, prior to such trial the pleadings of all appellants had been amended so as to allege that the well on lot 173 drained oil from the common pool tapped by the community wells and thus impeded full performance of the community lease. Without a fuller knowledge of the contents of the pleadings we are unable to determine precisely the issues presented at the second trial, or to learn whether plaintiffs Tanner and Hunt now seek to quiet title in themselves alone as against any claim by defendant Olds to an interest in the community royalties or whether plaintiffs intend to share the Olds' one-ninth portion with the other six original lessors or their successors in interest. consequently we shall consider on these appeals only the question of whether the drilling on the Olds' lot 173 and the resultant lessening of production from the community wells caused a forfeiture of the one-ninth interest of the Olds in the community production.

As ground for reversal, appellants rely solely upon the language quoted hereinabove from our opinion upon the former appeal, and in particular upon the observations that "Every contract contains an implied covenant on the part of each party not to prevent or hinder performance by the other party. [Citation.] Upon fundamental principles, the law will not allow one to claim royalties under a community lease and at the same time diminish the amount of oil which might otherwise be recovered for the common benefit of all the lessors." However, as is apparent from the further statement in that opinion to the effect that "In the present case, however, no evidence was offered to show that the well on the land of the Olds is draining oil from the source of supply under the community lease," the second of the above quoted observations is dictum.

[1] And upon further consideration, we are of the view that the first of such two quoted observations is not relevant to any issue presented by the facts before us. One party to a contract is able to hinder performance by another party only when the contract as to such latter party remains unexecuted, or in other words, when the latter party has not yet completely performed all of his obligations under the contract. But here no one of the lessors in the community oil lease owed any duty of performance to any one of his colessors; the contract as between the colessors constituted a fully executed assignment or conveyance by each lessor to the others of "a percentage interest in all oil produced on his land by the lessee during the continuance of the lease. The consideration for that transfer was the similar mutual assignments of the other lessors." (Tanner v. Title Ins. & Trust Co. (1942) supra, 20 Cal.2d 814, 820, 129 P.2d 383, 386.) Such transfer constituted the colessors joint owners, or tenants in common, of all the royalties reserved. (See 8 Cal.Jur. 10-Yr. Supp. § 161, p. 779; Veal v. Thomason (1942), 138 Tex. 341, 159 S.W.2d 472, 476.) The performance which remained to be carried out under the terms of the lease was due only as between the lessee on the one hand and the lessors on the other; consequently no lessor, or cotenant in the royalties, could possibly hinder a performance from another lessor to which he was not entitled in any event, and the lessee is not a complaining party before the court.

Thus the problem is resolved to the question of whether the owner of property may use it for a purpose, otherwise permissible, which lessens the profits of other property in which he is a cotenant, and, therefore, the profits of his cotenants.

[2] As stated in our opinion upon the former appeal (page 820 of 20 Cal.2d page 386 of 129 P.2d), respondent Olds' one-ninth royalty interest in the community wells is an estate in real property, "an incorporeal hereditament analogous to the right to receive future rents." As also determined in that opinion, there is nothing in the lease contract which restricts the use to which a surrendered lot may be put. Nor does any clause of the lease provide for forfeiture for any cause whatsoever of the one-ninth interest of each lessor in the community production.

[3, 4] And while a cotenant may not commit waste of the common estate (see Code Civ.Proc. § 732; 7 Cal.Jur., § 34, p. 366) we have discovered no authority which suggests that the Olds by producing oil from their own land were committing waste of the community production by reason of the facts that the wells drained from a common pool and that the Olds' well lessened the profits of the community wells.

[5] Subsequent to the surrender agreement and the quiet title action against plaintiffs herein Tanner and Hunt, Mr. and Mrs. Olds held lot 173 as free of the lease as if it had never been included therein. If at the time of the making of the community lease, or at any time thereafter, either before or after the surrender of lot 173, the Olds had owned property contiguous to that originally covered by the community lease but not included therein and had by producing oil therefrom lessened the production of the community wells, it could not upon any theory of law of which we are aware be held that the Olds had thereby forfeited their interest in the community production. Nor after the surrender and quitclaim agreement joined in by the lessee and all of the community lessors and substantiated by a quiet-title decree to the effect "that the plaintiffs, F. H. Olds and Emma F. Olds, were, * * * and

now are the owners in fee simple of lot 173 and that the claims of George Tanner, Emma Tanner, Emery B. Hunt, Mabel G. Hunt, * * * defendants, and all persons claiming said premises under said defendants, or any of them, are hereby adjudged to be invalid and groundless, and that the defendants, or any of them, have not any right, title or interest in said premises or any lien thereon, or any part thereof, and the said defendants are hereby forever barred from any and all claims of right or title to said premises, or any part thereof, and the said defendants, and each of them, are hereby perpetually enjoined from setting up any claim or claims to said premises or any part thereof," were the Olds any more restricted in the uses to which lot 173 could be put than they would be in the uses of any such other contiguous property which they might own.

Further support for our view may be found in the fact that had Mr. and Mrs. Olds sold lot 173 the purchaser would have taken the land free of any claims or rights of the community lessors or their successors in interest; or had Mr. and Mrs. Olds sold their one-ninth interest in the community production the rights of the purchaser could not be forfeited by reason of the purposes for which lot 173 might be used.

For the reasons above stated, the judgments appealed from are, and each of them is, affirmed.

GIBSON, C. J., and SHENK, CARTER, and SPENCE, JJ., concurred.

EDMONDS, Justice (dissenting).

In my opinion, the rule stated in Tanner v. Title Ins. & Trust Co., 20 Cal.2d 814, 825, 129 P.2d 383, that "the law will not allow one to claim royalties under a community lease and at the same time diminish the amount of oil which might otherwise be recovered for the common benefit of all the lessors" has a much broader application than as now interpreted and should be applied as controlling the rights of the parties in the present controversy. It stems from the ordinary principles of honesty and fair dealing which are recognized and applied under a wide variety of circumstances. Simply stated, it declares that one may not take a profit from property which he has transferred for the joint benefit of himself and others when by doing so he gains an advantage over his associates in the enterprise.

A contract contains an implied covenant that a party, even after performing its obligations, will do nothing to prevent the other party to it from obtaining the full benefit to be derived from its performance. More specifically, if one party transfers to the other a right for the purpose of sharing the benefits to be derived from its exercise, the transferor of the right cannot depreciate its value by diminishing the profit to be obtained by its exploitation. Accordingly, it has been held that when the author of a play, or another person entitled to the right to its performance, has transferred that right insofar as stage presentation is concerned, or has given a license for a certain time, he cannot depreciate the value of the thing transferred by granting the right to another to produce the play as a motion picture. Manners v. Morosco, 252 U.S. 317, 327, 40 S.Ct. 335, 64 L.Ed. 590; Harper Bros. v. Klaw, D.C., 232 F. 609, 613; Kirke La Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79, 87, 188 N.E. 163; see 5 Williston, on Contracts (Rev.Ed.) § 1293A. As stated by the New York Court of Appeals in the Kirke La Shelle case, supra, 263 N.Y. at page 87, 188 N.E. at page 167, "In the last analysis those cases only apply the principle that in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing." In Underhill v. Schenck, 238 N.Y. 7, 14, 143 N.E. 773, 775, 33 A.L.R. 303, the court, in regarding the relation between the licensor and licensee as to the performance of a play, stated: "This fiduciary relation charged the fiduciary with a duty to refrain from forms of competition involving unfair diversion of royalties or profits. The position of such a one is analogous in this respect to the position of a partner. What he gains from a competing business, if the competition is so close as to transcend the bounds of fairness, he is not to keep for himself, but is to surrender to the joint adventure."

Under a community lease, each of the colessors abandons his opportunity for maximum profit from his property in exchange for the right to share in the proceeds to be derived from a much larger tract of land. He insures himself against the risk that the amount of oil which could be produced from his land is less than an agreed share of the possible production from his own property and that of his neighbors as a whole. One who makes such a contract should not be allowed, at a later time, to divert oil from the community well; such conduct amounts to unfair competition with the common enterprise.

Giving effect to these principles, plaintiffs are entitled to recover such amount as will compensate them for the amount by which their royalty has been reduced on account of the diversion by the defendants of oil from the pool tapped by the community wells.

29 Cal.2d 69

PEOPLE v. PETERSON.

Cr. 4724.

Supreme Court of California, in Bank.
Sept. 24, 1946.

1. Homicide 🔑18(5)

Murder in perpetration of robbery is, by force of statute, of the first degree. Pen.Code, § 189.

2. Criminal law 🔑407(2)

The admission of accusatory statements of police officers, and defendant's equivocal replies, was not abuse of discretion where statements comprised recitals of competent evidence thereafter introduced against defendant, and accusations were virtually inescapable inferences from such evidence, and defendant's admissions and other evidence connected defendant with the crime.

3. Criminal law 🔑761(12), 822(4)

An instruction assuming that defendant killed deceased was objectionable, notwithstanding that the instruction was code law, but was not prejudicial where, viewing the instructions and the evidence as a whole, the jury was not misled. Pen.Code, § 21.

4. Homicide 🔑286(3), 340(1)

Instructions that certain kinds of murder carry with them conclusive evidence of premeditation and that a man can premeditate, or think before doing the act, the moment he conceives the purpose, were erroneous, but were not prejudicial, where evidence showed that defendant beat deceased to death in robbing deceased, and such murder was exclusively first-degree murder by legislative definition. Pen.Code, § 189.

5. Homicide 🔑253(6)

Evidence sustained conviction of murder in the first degree in the perpetration of robbery. Pen.Code, § 189.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

John J. Peterson was convicted for first-degree murder. From a judgment imposing the death penalty and from an order denying a new trial, he automatically appeals under Penal Code, § 1239.

Judgment and order affirmed.

A. L. Matthews, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

[1] Defendant* was charged with the murder of Marion Berger and with three

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* This defendant was before us on a former appeal after conviction on the same charge. The case was then entitled People v. Sarazzawski and is reported in 27 Cal.2d 7, 161 P.2d 934. The present appeal follows conviction on the new trial.

prior convictions of felony. He pleaded not guilty and admitted the prior convictions. A jury found him guilty of murder of the first degree and made no recommendation as to penalty. This is an automatic appeal from the judgment imposing the death sentence and from an order denying defendant's motion for a new trial. Defendant offered no evidence. The strong circumstantial case presented by the People shows that defendant murdered Mrs. Berger in the perpetration of a robbery. The murder, therefore, is by force of statute (Pen.Code, § 189) of the first degree. (People v. Valentine (1946), 28 Cal.2d 121, 169 P.2d 1; People v. Bernard (1946), 28 Cal.2d 207, 169 P.2d 636.) The record discloses certain erroneous and conflicting instructions but after a review of the entire case we are satisfied, for the reasons hereinafter appearing, that the erroneous instructions did not contribute to the verdict and that the judgment and order must be affirmed.

The deceased was the wife of David Berger. In April, 1943, Mr. Berger commenced work as personnel director and head of the welfare department of the manufacturing plant where defendant was employed. He became acquainted with defendant and in his official capacity on various occasions gave defendant advice and assistance concerning defendant's personal problems. Defendant was an alien and was on parole; among Berger's duties as head of the welfare department was the preparation of monthly reports concerning defendant required by federal and state authorities. Twice defendant called on Mr. Berger at the Berger home in Los Angeles to seek advice as to difficulties in which he found himself. Mrs. Berger was present on these two occasions. Mr. and Mrs. Berger, defendant, and Mrs. Ann Straw, a friend of defendant, once went to dinner together at defendant's suggestion. This was the extent of defendant's acquaintance with deceased prior to the night of May 10, 1944, when she was killed.

On May 7, 1944, Mr. Berger left Los Angeles for Chicago on a business trip. He planned to be away from Los Angeles for two weeks. His proposed trip had been known to and generally discussed among the employes of the plant. He had arranged for Mrs. Berger to go to San Francisco on the morning of May 11. About 7 p. m. on May 10, 1944, Mrs. Berger was in the yard of her home. She there told the boy of a neighbor that she was going to San Francisco. The boy observed nothing unusual in her manner. No witness thereafter saw Mrs. Berger alive. Later in the evening she, accompanied by defendant, left her home. A week later her body was recovered from the Pacific Ocean.

About 7 p. m. on May 10 defendant went to the rooming house where he lived. According to his landlady "he changed his clothes, I guess, and he went out to get some gas and then he came out and said, 'You might not see me any more.'" Defendant then called on his friend Mrs. Straw and her grandmother. He stayed only about 15 minutes and, according to Mrs. Straw, they spoke of "common-place" things. Defendant was next seen by a witness about 11 p. m. on May 10, when he entered a cafe located in Ventura County, on the Coast Highway near the boundary between the counties of Los Angeles and Ventura. According to the woman who operated the cafe defendant purchased a bottle of beer which he drank "hurriedly and nervously." Defendant did not appear to be under the influence of liquor.

On the night of May 10 one Sneathen, a Coast Guardsman, was on patrol with his dog in the vicinity of Point Mugu, a promontory in Ventura County, about 10 miles northwest of the Los Angeles County line. The Coast Highway runs near the ocean at this point and there is a rather sharp drop of about 20 feet from the highway to a sea wall. About 11:20 p. m. Sneathen saw defendant's car parked off the highway near the bank. Sneathen looked in the car, saw no one, then went to the bank and saw defendant coming up from the ocean. He questioned defendant, who at first did not reply, then "said he was looking for another man and woman there, supposed to be fishing down in there. * * * He said in a nervous way * * * that this man was out with * * * [a]nother man's wife, and he told me he shouldn't be. * * * Then after a short spell he wasn't near as nervous, so I * * * decided to continue on my patrol, and as I turned to go he struck me on the head" with a tire iron (a narrow iron bar), knocked Sneathen down, and continued to beat him. The dog attacked defendant, giving Sneathen an opportunity to get to his feet. Sneathen ran to a nearby telephone and called his camp. Defendant pursued him but halted when Sneathen, who was armed with a pistol, threatened to shoot. Defendant then ran to his car, got in it and drove a short distance in the direction of Santa Monica, turned around and drove a short distance past Sneathen and away from Santa Monica, turned around again, and stopped about 100 yards from Sneathen. He got out of his car and again advanced toward Sneathen, not stopping although Sneathen told him to halt. Other Coast Guardsmen arrived and took defendant to their camp. Deputy sheriffs of Ventura County came to the camp and took defendant into custody. To questions as to "what he did with the woman that he had in the car," defendant "wouldn't say anything * * *, he just stood mute." Defendant did not appear to be intoxicated when he was apprehended.

In the back of defendant's automobile were Mrs. Berger's open purse (which contained, among other things, papers bearing her name and address and ration tokens), her suit case, packed, and her hat. On the floor in the front of the car were red and blue ration tokens. There were blood and "reddish" human hair on the back of the right front seat (Mrs. Berger's hair was "auburn"), blood on the inside panel of the right door, and a pool of blood on the floor, flowing out onto the running board. Also found in the car were a pigskin glove of defendant and the tire iron; on both were stains of blood. Defendant's shirt and trousers were spotted with blood and his trousers were badly torn. Defendant was questioned by the Coast Guardsmen and the deputy sheriffs. He first refused to talk, then stated that "he had had a fight with a man by the name of Harry, and that is how the blood got in the car, and the fight had been over some woman down in Venice, and this Harry had taken the woman away from him."

Mrs. Berger's wedding ring was found in the toilet bowl in a cell of the Ventura jail where defendant was held for a time. Further examination of the ground in the vicinity of Point Mugu disclosed spots of blood along the bank leading down to the sea and "a slight ditch or trench [in the loose shale of the bank], as though something might have been drug or thrown through there." A piece of rayon fibre of the sort used in women's undergarments was caught on the rock embankment. Mrs. Berger's brooch was found near the spot where defendant's car was parked at Point Mugu.

On the morning of May 11 police officers of Los Angeles went to Ventura in connection with the case. Defendant repeatedly denied any knowledge of the whereabout of Mrs. Berger or her body. The officers returned to Los Angeles with defendant and at defendant's direction drove to a point on Menlo Avenue between Pico and Olympic. There in the street they found a large pool of blood, a smaller spot of blood, the blood-stained mate to defendant's glove which had been found in his car, and a blue ration token. All the mentioned blood stains were analyzed by a police chemist, who testified that they were human blood.

Off Point Mugu the ocean current flows southeast (toward Santa Monica). On May 17 Mrs. Berger's nude body was found in the sea near a point in Los Angeles County about 13 miles southeast of Point Mugu. The autopsy surgeon testified that she died as the result of six or seven deep head wounds made by the blows of a narrow instrument.

On May 12, to the police, and on May 13, to the police and Mr. Berger, defendant, who was imprisoned in the Los Angeles jail, gave the following account of Mrs. Berger's disappearance (her body had not been recovered):

On the evening of May 10 defendant went to the Berger house. Mrs. Berger, when she admitted him, seemed distraught. She introduced defendant to a man called Harry, whose last name defendant did not learn. Defendant described Harry as about 45 years old, about 5 feet 10 inches tall with dark reddish hair. Harry and Mrs. Berger were arguing. Harry asked defendant, "What do you think of a woman running away from me to Frisco and I want to take her with me." Defendant, feeling that this was a private quarrel, expressed his desire to leave. Mrs. Berger asked him not to go and at her suggestion the three went to defendant's car. Mrs. Berger then said she would get her suit case to take to the railroad station. Defendant volunteered to get the suit case and asked for the key to her house, which she gave him. When defendant returned with the suit case Harry was in defendant's car scuffling with Mrs. Berger. Defendant pulled Harry from the car, knocked him to the ground, and defendant, with Mrs. Berger, drove away. Defendant stopped on Menlo Avenue to look for an apartment. There were no vacancies. Defendant returned to his car and found Harry sitting in it, wearing defendant's gloves (which defendant had left on the seat of the car), and hitting Mrs. Berger with a tire iron. Defendant and Harry fought. Mrs. Berger meanwhile was "hollering and screaming bloody murder" but no one came to the scene. (The west side of Menlo Avenue where defendant's car was parked was vacant; on the east side were apartment houses.) As they fought, Harry asked defendant to take Mrs. Berger to a hospital. Defendant said, "the condition you have got her in, what will that get us?" Harry then suggested that they go to Santa Monica, where he knew a doctor. Harry had a car. He led the way, with defendant and Mrs. Berger following in defendant's car. They went first to Ocean Park, found no doctor, then went to Santa Monica, stopped, and defendant decided that Harry was not trying to find help for Mrs. Berger. Mrs. Berger suggested, "Let's go to the beach, maybe the air will make me feel better." Defendant recalled that he had once seen a first aid station up the coast and drove toward it. He became aware that a car was following him. At Point Mugu he turned off the lights of his car and drove off the highway to let the pursuing car pass. Harry "drives up in his car * * * and the first thing I knew they were scuffling again." Harry was seated in defendant's car with Mrs. Berger. Defendant struck Harry with the tire iron, pulled him out of the car, and Harry ran to his own car, which would not start. Defendant went to help Harry start his car and "I had quite a few drinks in me too and, instead of coming towards the car, I went the other way and when I came back he was gone and she was." Defendant looked in his car and "all of her junk was still back there and her pocket book wide open there and I got out and the first thing I saw a Coast Guard," who questioned defendant, "and I got in a fight with him because I was afraid that he would turn me in."

After defendant on May 13 had given this account of the events of May 10 to Mr. Berger and police officers Lt. McGarry and Lt. McCreadie, McGarry questioned defendant as to certain improbabilities and matters left unexplained. Defendant's explanations were confused and involved him in further improbabilities. Defendant insisted that he did not know what had become of Mrs. Berger or her body. Lt. McGarry then stated, "I am accusing you, cold turkey before the man that has been kind to you [Berger]—that you took the man's wife out from her home and took all the personal belongings with the understanding that she was going to the depot * * * and, instead of that, you took her out and killed her, and now the man's entitled to know where the body is so he can give her a decent burial. * * * You know there wasn't any other man there." Defendant responded, "You weren't there to see it, were you?" To other, less bluntly accusatory statements defendant gave similarly evasive responses. To the question, "What do you think happened to her?" defendant replied, "I don't know anything more about it than you do. * * * A detective should have an answer to that." Defendant's attitude during this interrogation by the police is further illustrated by the following responses to the officers' summarization of the circumstantial evidence against defendant: "If, as you say, you got that much on me, why try to get anything else? Why not send me to the gas chamber or chair and get it over with? It doesn't matter to me"; "Get me in the court and get it over with"; "Why don't you start the third degree? That's the usual routine." (In response to Lt. McGarry's questions, however, defendant said that he had been kindly and patiently treated by the police officers during his confinement in the Los Angeles jail.)

No person other than defendant who knew or knew of Harry has been found. The police have unsuccessfully sought such information from the time defendant first told them of Harry. (After a previous trial of this matter defendant moved for a new trial on various grounds, which did not include the ground of newly discovered evidence. Defendant's counsel, however, on oral argument of the motion stated, "I have just been informed by my client that the witness who is in the Army [and whom defendant had mentioned in his testimony] is now available. * * * [O]f course, I haven't had time to prepare an affidavit, but that witness will testify to the fact of this Harry." Such witness has not been produced by defendant.)

[2] The admission in evidence of the accusatory statements to which defendant gave equivocal replies was not in the circumstances, an abuse of discretion. The statements comprise recitals of competent evidence thereafter introduced against defendant at his trial, together with McGarry's direct accusation in the form of virtually inescapable inferences therefrom, made under circumstances which rendered the accusations not unjustified. Defendant had just completed a purportedly exculpatory explanation of Mrs. Berger's disappearance with McGarry and McCreadie quite probably considered fantastic. It appears that defendant's evasive replies were made pursuant to his concept of the privilege against self-incrimination, for in response to Lt. McCreadie's question, "Is the evidence right or wrong? If you are innocent we sure as hell don't want to prosecute you," defendant said, "A person doesn't have to say anything until he gets in court. It's not compulsory." Defendant then refused to answer the question, "Do you want to deny it [the evidence]?" But defendant had freely admitted that he had been to the Berger residence on the night of May 10 and had left there with Mrs. Berger in his car, that she had been the victim of a vicious battery committed in his presence and had been with him as he drove from the scene of such battery to a spot some 50 miles away, where defendant, in a strikingly similar manner, committed a battery upon the Coast Guardsman Sneathen. Considering not only defendant's responses to the accusations but also his above recited admissions, his replies to other questions of the Coast Guard and police, and the other evidence which connected defendant with the crime, the admission in evidence of the whole conversation of May 12 among defendant, Berger, McCreadie, and McGarry appears to have been entirely proper. (Cf. People v. Simmons (1946), 28 Cal.2d 699 et seq., 172 P.2d 18; People v. Leary (1946), 28 Cal.2d 740, 172 P.2d 41; Id. (1946), 28 Cal.2d 727, 172 P.2d 34.)

[3] Defendant is not represented by counsel on this appeal. The counsel who represented defendant at the trial sought and received permission to file an amicus curiae brief in which, without waiving other points, he presents two propositions which, he urges, are each sufficient ground for reversal.

He complains of the following instruction: "In determining the intention of the defendant at the time of the transaction complained of, it is important to consider the means used to accomplish the killing. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots, nor lunatics, nor affected with insanity. The willful use of a deadly weapon without excuse or provocation, in such a manner as to imperil life, generally indicates a felonious intent." Such instruction is obviously objectionable for various reasons, among them, in that it assumes that defendant killed deceased. As amicus curiae points out, "The Court should not, directly or indirectly, assume the guilt of the accused [or any fact to be determined by the jury], nor employ equivocal phrases which may leave such an impression." (People v. Williams (1860), 17 Cal. 142, 147; 8 Cal.Jur., Criminal Law, §§ 351, 352.) Since "the intention of the defendant at the time of the transaction complained of" and "the sound mind and discretion of the accused" are not material unless, as the instruction assumes, defendant did "accomplish the killing," amicus curiae is correct in his contention that the instruction (for this reason alone and regardless of other objectionable features) should not be given in a case such as this, where defendant does not concede participation in the transaction. And this is so although the second sentence which assumes that the accused committed the offense is code law (Pen.Code, § 21.)

But the case presented to the jury does not appear to have been a close one and no miscarriage of justice is shown as a result of the giving of the instruction. Viewing the instructions and the evidence as a whole we are satisfied that the jury could not have been misled but rather must have understood as they were told, that the defendant was "presumed to be innocent until the contrary is proved"; that "you are the sole and exclusive judges of the facts and of the weight of evidence"; and "you are to judge of the facts upon the testimony and other evidence produced here in court."

Amicus curiae urges that the provisions of the California Constitution (art. I, § 13, as amended 1934) and Penal Code (§ 1323) which permit comment by court and counsel upon a defendant's failure to explain or deny evidence against him, are unconstitutional. His arguments are those rejected by this court in People v. Adamson (1946), 27 Cal.2d 478, 486 et seq., 165 P.2d 3, and he presents them in order that defendant may preserve a right to claim the benefit of a decision favorable to the defendant in the Adamson case, which is now before the United States Supreme Court (66 S.Ct. 1373).

[4] The court, in instructing the jury as to what constitutes murder of the first degree (apparently inadvertently, in the light of its other instructions), erroneously included portions of disapproved former stock instructions declaring that "There are certain kinds of murder which carry with them conclusive evidence of premeditation * * * [etc.]," and that a man "can premediate, that is, think before doing the act, the moment he conceives the purpose." Each of these two former stock instructions has been often condemned. (People v. Bender (1945), 27 Cal.2d 164, 182–185, 163 P.2d 8; People v. Valentine (1946), supra, 28 Cal.2d 121, 169 P.2d 1; People v. Bernard (1946), supra, 28 Cal. 2d 207, 169 P.2d 636; People v. Honeycutt (1946), Cal.Sup., 172 P.2d 698.) In the present case they directly conflict with other, correct instructions which the court gave on the same subjects. "Inconsistent instructions have frequently been held to constitute reversible error where it was impossible to tell which of the conflicting rules was followed by the jury. [Citations.]" (People v. Dail (1943), 22 Cal.2d 642, 653, 140 P.2d 828.)

Upon the record in this appeal, however, the evidence shows that defendant beat Mrs. Berger to death in robbing her. Such a murder, as the jury were advised, is by legislative definition essentially and exclusively murder of the first degree. (People v. Valentine (1946), supra, 28 Cal.2d 121, 169 P.2d 1; People v. Bernard (1946), supra, 28 Cal.2d 207, 169 P.2d 636.) Neither of these last mentioned errors, therefore, appears to have contributed to the verdict.

[5] Since no error which can reasonably be held to have prejudiced any substantial right of defendant appears, and as the evidence amply supports the verdict, the judgment and order appealed from are affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, and SPENCE JJ., concurred.

EDMONDS, J., concurred in the judgment.

29 Cal.2d 95

WOODBINE v. VAN HORN.

L. A. 19355.

Supreme Court of California, in Banc.
Oct. 1, 1946.

1. Contracts 🔑153

A contract must be interpreted so as to make it lawful, operative, definite, reasonable and capable of being carried into effect, if that can be done without violating parties' intention. Civ.Code, §§ 1643, 3541.

2. Evidence 🔑461(1)

When language employed in contract is fairly susceptible of either one of two constructions, extrinsic evidence is admissible to explain parties' intention. Civ. Code, § 1647; Code Civ.Proc. § 1860.

3. Contracts 🔑169
Evidence 🔑450(5), 461(1)

To explain contract containing language fairly susceptible of either one of two constructions, reference may be had to circumstances under which it was made and the matter to which it relates, and conversations between and declarations of parties during negotiations at and before execution of contract may be shown. Civ. Code, § 1647; Code Civ.Proc. § 1860.

4. Contracts 🔑170(1)

A construction given contract by acts and conduct of parties with knowledge of its terms before any controversy has arisen is entitled to great weight and will, when reasonable, be adopted and enforced by court.

5. Contracts 🔑189

A construction of a contract as bilateral, affording protection to both parties, is favored rather than a unilateral construction.

6. Appeal and error 🔑1011(1)

The trial court's construction of contract after proper resort to aids to construction is ordinarily conclusive if extrinsic evidence is conflicting, and the determination is supported by evidence. Civ.Code, §§ 1643, 1647, 3541; Code Civ. Proc. § 1860.

7. Contracts 🔑10(4)
Sales 🔑1(4)

A written agreement stating that seller "hereby sells and conveys" to buyer all of eucalyptus wood on described property for $9 per cord and that buyer was to render statement each month and make payments 10 days thereafter was not void for lack of mutuality of obligation or because of uncertainty, in view of evidence that buyer obligated himself to buy all of wood for $9 per cord. Civ.Code, §§ 1643, 1647, 3541; Code Civ.Proc. § 1860.

8. Sales 🔑1(4)

An agreement for sale of all of eucalyptus wood located on described property for $9 per cord, but providing that buyer was to render statement each month and make payment 10 days thereafter, was not illusive as a "desire or need" agreement, in view of specific description of goods sold as all of wood located on property. Civ.Code, §§ 1643, 3541.

9. Sales 🔑81(2), 82(2)

Under contract for sale of wood requiring buyer to send trucks to haul wood, but specifying no time for performance of such act, buyer and seller were required to perform within a reasonable time. Civ. Code, § 1657.

10. Sales 🔑1(4)

Provisions of contract for sale of wood that prices concerning lengths of wood not covered by contract and that sold to United States were to be adjusted by parties, although creating uncertainties in agreement, were severable from remainder of contract and, in absence of controversy relating thereto, did not affect rights of parties under remainder of contract.

11. Sales 🔑201(2)

Under contract stating that seller "hereby sells and conveys" to buyer all of eucalyptus wood located on described property at $9 per cord delivered f. o. b. trucks of buyer, title to wood passed to buyer, in view of evidence showing that parties so intended and establishing partial payment prior to delivery of any wood. Civ.Code, § 1739, rule 2.

12. Sales 🔑199

Where there is a contract to sell specific or ascertained goods, property in them is transferred to buyer at such time as parties to contract intend it to be transferred.

13. Sales 🔑199

In determining when parties to contract to sell specific goods intend property in goods to pass to buyer, regard must be given to terms of contract, conduct of parties, usages of trade and circumstances. Civ.Code, § 1738.

14. Sales 🔑197

The use in sales contract of words "sells, sold and convey" indicates that parties intend property in goods to pass, but their presence in agreement is not necessarily determinative of question as to whether parties intended a sale. Civ.Code, § 1738.

15. Sales 🔑201(2)

The provision of contract for sale of wood that wood was to be delivered f. o. b. trucks of buyer was not necessarily inconsistent with immediate passage of title to wood, where parties meant merely that seller would load buyer's trucks with assistance of drivers. Civ.Code, § 1739, rule 2.

16. Sales 🔑218½

Where, after execution of sales agreement, seller is bound to do something to specific goods to put them into deliverable state, a presumption arises that parties did not intend that property pass until such thing be done, but that presumption is not conclusive if there is substantial evidence justifying determination that contract is one of sale. Civ.Code, § 1739, rule 2.

17. Sales 🔑197, 202(7)

Conduct of parties to sales contract frequently shows whether they regard bargain as passing property, and fact that part of purchase price is paid by buyer is evidence that parties contemplate immediate transference of property in goods. Civ. Code, § 1738.

18. Injunction 🔑128

In action by buyer to restrain seller from disposing of wood purchased, evidence showing that it was impossible to purchase in open market type and quality of wood contracted for and that seller's financial condition was such that a money judgment against him would not be collectible warranted issuance of injunction.

19. Appeal and error 🔑870(4)

A preliminary injunction became final upon failure to take any appeal from order granting it. Code Civ.Proc. § 963.

20. Appeal and error 🔑1048(2)

In action for conversion of wood, whether one of witnesses was qualified to testify concerning quantity of wood was immaterial where defendant's testimony did not differ materially from that of witness.

21. Sales 🔑87(3), 181(11), 417
Trover and conversion 🔑40(4, 6)

In buyer's action against seller for conversion of wood and to recover for alleged refusal to deliver wood purchased, conflicting evidence sustained findings with regard to quantity of wood covered by contract, amount received by buyer and appropriated by seller and omissions of seller resulting in buyer's failure to remove wood.

22. Appeal and error 🔑931(1)

Although minor inconsistencies, legal conclusions and evidentiary matters appear in findings, they must be liberally construed and resolved in favor of upholding judgment.

23. Trover and conversion 🔑46, 54

The detriment caused by wrongful conversion of personalty is presumed to be value of property at time of conversion, with interest from that time, or an amount sufficient to indemnify party injured for loss which is natural, reasonable and proximate result of wrongful act complained of, and an injured party should also be awarded fair compensation for time and money properly expended in pursuit of property. Civ.Code, § 3336.

24. Appeal and error 🔑1071(1)

In action for conversion of wood, trial court's error in finding value of wood as of date of commencement of action, rather than at time of conversion, did not require reversal, where, in view of testimony covering value during period from time of conversion until commencement of action, finding of damage was supported by evidence of market value at time of conversion.

25. Appeal and error ⚿110, 782

A purported appeal from order denying new trial was dismissed, since such an order is not appealable.

◆

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Action by W. H. Woodbine against H. R. Van Horn to recover damages for conversion of eucalyptus wood purchased by the plaintiff, and to obtain an injunction restraining the defendant from disposing of the wood, wherein the defendant filed a cross-complaint seeking a declaratory judgment. From a judgment for the plaintiff and from an order denying a new trial, the defendant appeals.

Judgment affirmed and the purported appeal from order denying a new trial dismissed.

Prior opinion, 163 P.2d 895.

J. La Mar Butler, of Los Angeles, A. H. Brazil, of San Luis Obispo, and William J. Clark, of Los Angeles, for appellant.

Leo B. Ward, John M. Hines, and John A. Holland, all of Los Angeles, for respondent.

EDMONDS, Justice.

W. H. Woodbine's action for conversion is based upon a memorandum in writing signed by him and H. R. Van Horn concerning the sale of cord wood. As grounds for the reversal of the judgment in favor of Woodbine, Van Horn attacks the trial court's construction of the agreement and also the measure applied in fixing the amount of damages.

The complaint is in four counts. The first count pleaded the writing as being in these words: "For and in consideration of the promises and agreement of the parties hereto, and of the moneys paid and to be paid as hereafter set out, H. R. Van Horn, hereby sells and conveys to W. H. Woodbine, all of the eucalyptus wood located on the property [described] * * *, consisting of three thousand or more cords, to be cut in sixteen and twenty four inch lengths and all wood over five inches in diameter to be split, at the purchase price of nine ($9.00) dollars per cord, delivered F O B trucks of W. H. Woodbine. A statement is to be rendered by Woodbine to Van Horn of the number of cords of wood received by him during each month and payment therefor to be made ten days thereafter. Should advances be made to Van Horn by Woodbine the same shall be credited to wood delivered. Should wood of different lengths be required by Woodbine the price to be adjusted by the parties. Should any of such wood be sold by Woodbine to the U. S. Government an additional sum per cord to be paid to Van Horn as may be agreed upon by the parties."

Woodbine alleged that he was the owner of all the eucalyptus wood, consisting of 6,000 or more cords located on the property described in this writing, of the value of $26 per cord and that Van Horn converted 500 cords of the wood to his own use, to Woodbine's damage in the sum of $8,500. Upon information and belief, the pleader asserted that Van Horn was insolvent, that cord wood of the size and kind specified in the memorandum could not be purchased on the market and that an injunction was necessary to avoid a multiplicity of suits. In conclusion, Woodbine claimed that he had no speedy or adequate remedy at law and would suffer irreparable damage unless Van Horn was restrained from disposing of the wood.

As a second cause of action, Woodbine stated that Van Horn refused to deliver the wood or to permit the removal of any of it. Approximately 400 cords of wood had been cut and split into 16 and 24-inch lengths. By reason of the refusal to deliver, Woodbine had been damaged in the sum of $156,000, being the difference between the market price and the contract price.

The third count set out that, by the terms of the writing, Van Horn was required to load the wood f.o.b. the plaintiff's trucks. From and after the 1st of February, 1944, Van Horn refused to furnish more than one man for loading work, and it became necessary for Woodbine to hire and pay for labor to do this, to his damage in the sum of $353.59. On the 21st day of March, 1944, the complaint continued, Woodbine had a truck upon the premises where the wood was located, ready and waiting to be loaded, but Van Horn refused to load it or to permit Woodbine's employees to do so. The truck remained there about 50 hours, and then returned to Los Angeles. At the reasonable rental value of $4 per hour, Woodbine sustained damages in the amount of $244.

As the last count of the complaint, Woodbine alleged that he advanced $2,500 to Van Horn to be applied upon the purchase price of the wood. Nevertheless, Van Horn refused to deliver any of it except 242⅔ cords, leaving a balance due of $316.

Upon these facts, Woodbine prayed for injunctive relief and for judgment in the amounts of $8,500, $156,000, $597.59, and $316, upon the respective counts of the complaint.

By his answer, Van Horn admitted the execution of the writing set out in the complaint, but he denied that Woodbine was the owner of the wood, or that there were 6,000 cords on the property, or that it had a market value of $26 per cord. Its market value was $9 per cord, he alleged, and at the time the memorandum was signed, only 3,000 cords of wood were on the property. Van Horn also denied that he converted 500 cords of the wood to his own use, or that he unlawfully threatened to convert the remaining wood, or that he was insolvent and not able to respond in damages, or that Woodbine would suffer irreparable damages. Moreover, an injunction should not be granted, Van Horn pleaded, because he was the owner of the goods.

As a defense to the second cause of action, Van Horn asserted that the agreement between the parties was intended to be used for the purpose of deceiving and defrauding him by inducing him to deliver wood in a quantity which Woodbine would claim to be less than that received. On May 21, Woodbine allowed full cordage on two loads, but Van Horn refused to load the truck without a statement that full cordage was allowed on all four loads previously sent. Van Horn received no reply to his request for telegraphic confirmation of the amount delivered. Also, the wholesale market value of the wood was only $9 a cord.

The answer to the third cause of action specifically denied that the instrument was binding upon the parties, or that it required Van Horn to load the wood on Woodbine's trucks. There was also a denial of any damage suffered by reason of the facts stated in the complaint. The fourth cause of action was answered with the assertion that wood having a market value of $2,500 had been delivered to Woodbine and an admission that Woodbine had paid $2,500 on account of wood delivered and to be delivered to him.

As a separate defense to each cause of action, Van Horn alleged that Woodbine conceived and devised a plan to cheat and defraud him and the written instrument was executed pursuant to this plan; also that certain misrepresentations made by Woodbine had induced Van Horn to enter into the contract. Van Horn also alleged that, through mistake, the written instrument failed to express the real intent of the parties.

In addition to his answer, Van Horn filed a cross-complaint for a declaratory judgment that the instrument is void. He also asked that the agreement be rescinded upon the grounds of misrepresentation and fraud, and sought $15,500 damages by reason of the alleged improper issuance of the injunction. In answer to this cross-complaint, Woodbine denied its material allegations and, as separate defenses, pleaded that the counts did not state facts sufficient to state a cause of action, that there was part performance of the contract and that Van Horn was estopped to assert its invalidity.

With the issues thus framed the action proceeded to trial. There is a sharp conflict between the testimony of Van Horn and his wife on the one hand and Woodbine on the other as to the statements and representations which preceded and accompanied the execution of the instrument which is the basis of the controversy. According to Van Horn, the preliminary negotiations concerned the price and size of the wood, an agreement of Woodbine to advance $5,000, and his promise to furnish a team of mules and a workman to split logs. There was also conflicting testimony as to whether the words in the agreement, "For and in consideration of the promises and agreements of the parties hereto," referred to certain previous oral agreements of the parties. Another matter of controversy centered upon the date when the writing was signed. The attorney for Woodbine, who drew the document, testified as to conversations made contemporaneously with the execution of the instrument relating to the amount of wood contemplated by the parties and other provisions. And according to Van Horn, after the agreement was signed Woodbine again promised to provide a team of mules and a workman.

Six months after the contract went into effect, in answer to a letter from Woodbine, Van Horn admitted that he was selling wood locally and that he expected to continue such sales. He also stated in this letter that only half of the wood which was the subject of the agreement belonged to him and he was only selling his own wood. It appears that for several months there were controversies between the parties as to the method which should be used in stacking the wood, asserted shortages due to different methods of computation, and the person who was to furnish the men to load the wood. Finally, on March 21, Van Horn refused to load Woodbine's trucks.

Concerning the market value of the wood, one witness testified that its wholesale market value at the date of the alleged conversion was $10 a cord f.o.b. truck. By other testimony the value was placed at between $12 and $14 a cord. However, the wholesale ceiling price was $20 a cord. The wood on the premises at the time of the execution of the agreement was about 4,000 cords, and 3,526 cords remained.

After hearing the evidence, the court concluded that there was a valid contract of sale and gave Woodbine judgment upon all four counts. However, it determined that Van Horn converted only 159 cords of wood, to the buyer's damage of $159. As to the second count, the court found that the contract covered approximately 4,000 cords of fallen wood, that 3,526 cords of cut wood remained on the property, and that Van Horn had converted it to his own use. The market value of the wood at the time of filing the complaint and at the time of trial was $10 per cord, f.o.b. Woodbine's trucks, the court continued, and since the difference between the purchase price and market value was $1 per cord, the buyer was damaged in the further sum of $3,526 by reason of Van Horn's refusal to deliver the wood as required by the contract. The finding upon the third count was that by reason of the failure to load the truck, Woodbine was damaged in the sum of $204. As to the last cause of action, the court found that the buyer had advanced $2,500 to be applied upon the purchase price of wood to be delivered under the terms of the contract, that he received 246⅓ cords at the cost price of $2,217, and that the balance owing on the advance was $283. The findings were against Van Horn as to his separate defenses and cross-complaint and the preliminary injunction was continued in force, but modified to the extent of enjoining him from removing or disposing of 500 cords of wood. The appeal is from the judgment entered upon these findings and from an order denying a new trial.

As grounds for the reversal of the judgment, Van Horn asserts that the instrument sued upon created a contract to sell as distinguished from a sale, and that the instrument is void for uncertainty and lack of mutuality. In interpreting an agreement, particular words must be considered in connection with the rest of the agreement, Van Horn contends, and the uncertainties are to be resolved most strongly against Woodbine, who caused them to exist. The appellant also argues that Woodbine did not expressly promise that he would send trucks to remove the wood within any definite time or to do anything, and the contract is void because the quantity to be delivered is conditioned by the will, wish or want of Woodbine. Moreover, he declares, the provisions in the contract that if wood of different lengths should be required by Woodbine, and if the wood were sold to the federal government, the price should be adjusted by the parties, creates an uncertainty.

Other contentions of Van Horn are that the findings, being inconsistent, unsupported by the evidence, and permeated with legal conclusions and evidentiary matters are insufficient to support the judgment. Furthermore, the court erred in determining the measure of damages and also in receiving the testimony of an alleged expert. He lays great stress upon the testimony of Woodbine as so wanting in integrity that it does not afford a valid basis for a judgment. In conclusion, says the appellant, the injunction restraining him from disposing of the wood is contrary to the most fundamental principles of equity jurisprudence.

By the use of the words "sells and conveys," Woodbine asserts, the parties intended that title to the goods should pass to the buyer. The contract is not uncertain, nor lacking in mutuality, he maintains, and as evidence was received interpreting the contract, the construction placed upon the instrument by the findings and the judgment binds the appellate court. Any errors in fixing the damages resulted from the court's adoption of the theory proposed by the seller rather than that of the buyer. The testimony of Woodbine is not wanting in integrity, nor did the court err receiving the testimony of the expert. Moreover, the order granting a preliminary injunction was proper and as no motion to dissolve it was made nor an appeal taken from the ruling, it is now final.

[1-6] A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if this can be done without violating the intention of the parties. Civ.Code, §§ 1643, 3541; see, Rest., Contracts, § 236(a). When the language employed is fairly susceptible of either one of two constructions contended for, extrinsic evidence may be resorted to for the purpose of explaining the intention of the parties. A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates. Also, for this purpose, conversations between and declarations of the parties during the negotiations at and before the execution of the contract may be shown. Civ.Code, § 1647; Code Civ.Proc. § 1860; Walsh v. Walsh, 18 Cal.2d 439, 444, 116 P.2d 62; Wachs v. Wachs, 11 Cal.2d 322, 326, 79 P.2d 1085; First Nat. Bank v. Bowers, 141 Cal. 253, 262, 74 P. 856; see, Rest., Contracts, § 235(d), 242. Furthermore, a construction given the contract by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the court. Johnston v. Landucci, 21 Cal.2d 63, 71, 130 P.2d 405, 148 A.L.R. 1355; Mitau v. Roddan, 149 Cal. 1, 14, 84 P. 145, 6 L.R.A.,N.S., 275; Keith v. Electrical Engineering Co., 136 Cal. 178, 181, 68 P. 598; see, Rest., Contracts, § 235(e). Another important rule of interpretation is that which favors a construction of a contract as bilateral, affording protection to both parties, rather than unilateral. Davis v. Jacoby, 1 Cal.2d 370, 379, 34 P.2d 1026; see, Rest., Contracts, § 31. And when these aids to construction are properly resorted to, upon appeal the trial court's construction of the instrument is ordinarily conclusive if the extrinsic evidence is conflicting, and the determination is supported by the evidence. Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825; see, Stevenson v. County of San Diego, 26 Cal.2d 842, 844, 161 P.2d 553.

[7] Applying these rules, the instrument sued upon was not void for lack of mutuality of obligation or because of uncertainty and there is ample evidence to support the trial court's construction to that effect. From the instrument itself it is clear that Van Horn made a definite promise, but the corresponding obligation of Woodbine is ambiguous. The first sentence of the agreement appears to create mutual promises to buy and sell all of the wood located on the described property at the price of $9 per cord. It is not clear from the following sentence whether Woodbine impliedly promised to pay for all of

the wood or promised to pay only for the wood received each month. However, there is substantial evidence to support the finding of the trial court that Woodbine "obligated himself to buy all of said wood for the sum of $9.00 per cord."

The attorney for Woodbine, who drew the instrument, testified as to conversations between the parties at the time of the execution of the agreement. He testified that both parties agreed that Woodbine was "buying all the wood on the property and there is more than 3,000 cords." The attorney asked Van Horn how much wood he was selling and Van Horn replied: "Between three and six thousand cords." According to his testimony, Woodbine, at the time the contract was executed, said, "I am buying this wood at $9.00 a cord," and Van Horn said, "I am selling this wood at $9.00 a cord." And when Van Horn came to Woodbine's office to sign the contract he stated that the price was "for all of the wood." During the preliminary negotiations between the parties, Van Horn was asked, "Well, was anything said by you in the course of that conversation in regard to whether Mr. Woodbine would take all of the wood or whether some of it would be reserved by you?" Van Horn replied, "Yes," and that he "made specific mention we would want to reserve enough for local retail trade." Further evidence in support of the trial court's construction of this phase of the agreement is the testimony that Woodbine advanced to Van Horn the sum of $2,500 to be applied pursuant to the terms of the contract.

[8] The agreement is not illusive as a "desire or need" agreement. The goods sold are specifically described as "all" of the eucalyptus wood located on particularly described property, consisting of 3,000 or more cords. The contract covered approximately 4,000 cords of fallen wood and the parties agreed to sell and buy that amount at the sale price of $9 per cord.

[9, 10] Under the terms of the contract, as construed by the parties themselves, Woodbine was obligated to send trucks to haul the wood, and since no time was specified for the performance of the act, the buyer and seller were required to perform within a reasonable time. Civ.Code, § 1657. The provisions in the contract that prices concerning lengths of wood not covered by the contract and that sold to the United States Government were to be adjusted as agreed upon by the parties created uncertainties in the agreement. But no controversy arose concerning these provisions and they are severable from and immaterial to the promises sued upon.

Any uncertainty as to the amount of wood to be cut into 16 or 24-inch lengths was clarified by the construction of the contract placed upon it by the parties. According to the record of deliveries, approximately one-half of the wood taken by the buyer was in 16-inch lengths, the other one-half was of the 24-inch size, which substantiates the undisputed evidence that, at the time the contract was signed, the parties specified these proportions.

None of the cases cited by appellant supports his objections to the contract. In Schimmel v. Martin, 190 Cal. 429, 213 P. 33, 34, there was "the absence of an agreement by the plaintiffs to buy the water offered for sale by the contract." No specific amount of water was contracted for and the price unit was uncertain. The case of California Refining Co. v. Producers Refining Corporation, 25 Cal.App.2d 104, 76 P. 2d 553, concerned an agreement to refine all oil delivered to it by a producer, but the latter did not agree to furnish any particular quantity. Under these circumstances, as the court held, there was no mutuality of obligation with respect to the delivery of the oil. Each of the federal cases cited by appellant concerned an agreement in which there was a promise upon the part of one party with no corresponding obligation binding upon the other, the quantity of merchandise to be delivered being conditioned by the desire or whim of the producer. In the instant case, however, there was an ascertainable amount of wood contracted for and the price was fixed at $9 per cord. Mutuality of obligation was thereby established.

[11-16] Considering the present agreement, an ambiguity was created by the terms of the instrument in regard to the title to the wood, but there was sufficient

evidence to warrant the construction of the trial court that the intention was to pass the property in the goods to the buyer. Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of the trade and the circumstances of the case. Civ.Code, § 1738; see Vold on Sales, §§ 50, 51, p. 122. The agreement here sued upon stated that "Van Horn, hereby sells and conveys to W. H. Woodbine all of the eucalyptus wood located on the [described] * * * property." Although the use of such words as "sells, sold, and convey" indicates that the parties intend that the property in the goods pass (Christensen v. Cram, 156 Cal. 633, 635, 105 P. 950; Bailly v. Loock, 103 Cal.App. 220, 227, 284 P. 235; see 22 Cal.Jur. 948), their presence in an agreement is not necessarily determinative of the question as to whether the parties intended a sale. Universal Sales Corporation v. California etc. Mfg. Co., 20 Cal.2d 751, at page 768, 128 P.2d 665; Walti v. Gaba, 160 Cal. 324, 327, 116 P. 963; Blackwood v. Cutting Packing Co., 76 Cal. 212, 218, 18 P. 248, 9 Am.St.Rep. 199. Nor are the words "F O B trucks of W. H. Woodbine" necessarily inconsistent with the immediate passage of title. Southern Pac. Co. v. Hyman-Michaels, 63 Cal.App.2d 757, 764, 147 P.2d 692; Gianelli v. Globe etc. Co., 48 Cal.App. 103, 107, 191 P. 720; see Vold on Sales, p. 213 et seq. As construed by the parties, f. o. b. trucks meant that Van Horn would load Woodbine's trucks with the assistance of the drivers. Woodbine admitted that he orally promised to provide this help. If, after the execution of an agreement, the seller is bound to do something to the specific goods, for the purpose of putting them into a deliverable state a presumption arises that the parties did not intend that the property pass until such thing be done. Civ.Code, § 1739, Rule 2. Under the terms of the agreement, Van Horn, the seller, had to cut the wood into certain lengths and split some of the wood before the goods would be in a deliverable state. But this presumption is not conclusive if there is substantial evidence justifying a determination that the contract is one of sale.

[17] The conduct of the parties frequently shows whether they regard the bargain as passing the property and the fact that part of the purchase price is paid by the buyer is evidence that the parties contemplate an immediate transference of the property in the goods. Gianelli v. Globe etc. Co., supra, 48 Cal. App. at page 106, 191 P. 720; see Vold on Sales, p. 131 and cases cited under note No. 31; 22 Cal.Jur. 955. The parol evidence established that Woodbine paid Van Horn $2,500 pursuant to the agreement and before any of the wood was delivered. And the attorney, testifying in regard to the conversations between the parties at the time the contract was executed, stated: "I believe something was said that led me to believe that Mr. Van Horn was conveying the title to all the wood."

[18, 19] The complaint stated sufficient facts to warrant the issuance of an injunction and the evidence and findings sustained the allegations. The complaint alleged and the evidence tended to show that it was impossible to purchase in the open market well seasoned eucalyptus wood of the grade, character, and quality contracted for by Woodbine. Another charge established by the evidence was that because of Van Horn's financial condition, he could not respond in damages and a multiplicity of suits would result if Woodbine were required to maintain an action for each conversion. Van Horn complains that the finding as to his ability to respond in damages is a legal conclusion. However, it is followed in the same paragraph by detailed findings of facts as to his assets, the property owned by him and its value, the incumbrances against it, and his other debts and liabilities, from which it appears that a money judgment would not be collectible. Furthermore no appeal was taken from the order granting the preliminary injunction (Code Civ.Proc. § 963) and it is now final.

[20] The testimony of Woodbine does not appear to be unworthy of belief and all of the essential matters about which he testified were proved by other witnesses. And whether or not one of the other witnesses was qualified to testify concerning the quantity of wood on the property is immaterial in view of the fact that Van Horn's own testimony did not differ materially as to the number of cords of wood from that of the witness whose qualifications are questioned. Other evidence supports the conclusions in this regard.

[21, 22] The court made findings of fact as to the number of cords of wood covered by the contract, distinguishing between trees that had been severed and those that remained standing at the date the contract was executed. The court also found the number of cords received by Woodbine, the amount not delivered to him and the quantity appropriated by Van Horn to his own use. Other findings were that the respondent's failure to remove the wood was occasioned by the seller's neglect to have it in proper condition for removal as required by the contract. The testimony was conflicting, but these findings are supported by substantial competent evidence. And although minor inconsistencies, legal conclusions and evidentiary matters appear in the findings, they must be liberally construed and resolved in favor of upholding rather than of defeating the judgment. Menghetti v. Dillon, 10 Cal.2d 470, 472, 75 P.2d 596; Murray v. Tulare Irr. Co., 120 Cal. 311, 315, 49 P. 563, 52 P. 586. Certainly they disclose no prejudicial error.

[23, 24] The detriment caused by the wrongful conversion of personal property is presumed to be the value of the property at the time of conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted. Also the injured party should be awarded a fair compensation for the time and money properly expended in pursuit of the property. Civ.Code, § 3336. However, according to the findings, the trial court did not compute damages upon the basis of the wholesale market value of the property at the time of conversion, but used the market value of the wood either at the time of the filing of the complaint or at the time of trial in computing the amount of the judgment. Nor does it appear with any certainty that the alternative method provided by the statute for fixing the detriment caused by the wrongful conversion of personal property was considered by the court in making the award. But the error of finding the value as of the date of the commencement of the action does not require the reversal of the judgment. The complaint was filed about a month after the conversion and the testimony covers the wholesale market value of the wood during the period from the time of conversion until the commencement of the action. One witness testified that, "I have loaded lots of wood since March 20th [and for the next three or four months after that], and it is $12.00 and $14.00 a cord f. o. b. car." Another witness testified that "the market price has been approximately $9.00 to $10.00 wholesale." He later definitely stated that the price was $10 a cord f. o. b. truck. The finding of damage in the amount of $1 per cord is therefore supported by evidence of market value at the date of the conversion.

[25] The judgment is therefore affirmed and the purported appeal from the order denying a new trial is dismissed. Kellett v. Marvel, 6 Cal.2d 464, 476, 58 P.2d 649; Grimes v. Nicholson, 71 Cal. App.2d 538, 543, 162 P.2d 934; Joseph v. Vogt, 35 Cal.App.2d 439, 442, 95 P.2d 947.

SHENK, CARTER, SCHAUER and SPENCE, JJ., concurred.

76 Cal.App.2d 330

PEOPLE v. HILL.

Cr. 4015.

District Court of Appeal, Second District, Division 1, California.

Oct. 3, 1946.

1. Kidnapping ⚷5
Rape ⚷51(1)
Sodomy ⚷6

Evidence was sufficient to support convictions of kidnapping, rape and sodomy. Pen.Code, § 288a.

2. Criminal law ⚷1159(3)

Conflicting evidence for prosecution and defense raises question addressed to triers of fact, with whose determination appellate court cannot interfere.

3. Criminal law ⚷829(9, 18)

Where trial court instructed jury on doctrines of reasonable doubt and presumption of innocence in language of statute, refusal of defendant's offered instruction on such subjects was not error. Pen.Code, §§ 1096, 1096a.

4. Criminal law ⚷829(19)

An instruction that defendant was entitled to each juror's individual opinion was properly refused as covered by instruction that jury must reach verdict, just to both sides, expressing each juror's individual opinion.

5. Criminal law ⚷309

There is no legal presumption of defendant's good character.

6. Criminal law ⚷561(3)

Defendant's good reputation as to traits involved in charges against him should be weighed, if proved, as any other fact established.

7. Criminal law ⚷829(16)

Defendant's proffered instructions, amounting in great part to argument and mere repetition of court's lengthy instructions fully covering subject of witness' credibility, were properly refused.

8. Criminal law ⚷814(3)

Defendant's offered instructions that jury should not consider deputy district attorney's opinion or remarks that defendant was guilty or any statements of counsel were properly refused, in absence of contention or showing that such attorney expressed any such opinion or made any such remarks.

9. Criminal law ⚷829(1)

Where trial court instructed jury not to regard counsel's statements concerning facts as evidence, defendant's offered instructions that jury should not consider deputy district attorney's opinion or remarks that defendant was guilty or any statement of counsel were properly refused.

10. Criminal law ⚷829(1)

Defendant's offered instruction that filing of information did not constitute evidence of defendant's guilt was properly refused as fully covered by instruction that information was merely formal charge against defendant and must not be considered as evidence.

11. Criminal law ⚷814(17), 829(15)

Refusal of defendant's proffered instruction that if evidence presented two sets of facts, one tending to establish his innocence and the other his guilt, jury should adopt hypothesis tending to establish innocence, was not prejudicial error, where court fully covered such subject in other instructions and proof was not entirely or even substantially circumstantial.

12. Criminal law ⚷829(1)

In prosecution for rape and sodomy, defendant's proffered instructions that such charges are easily made and difficult to disprove and that jury must exercise utmost care in examining evidence and should view prosecutrix' testimony with caution were properly refused, where they were covered by instruction given and prosecution's evidence was credibly and impressively corroborated. Pen.Code, § 288a.

13. Criminal law ⚷755½

Defendant's incorporation of certain material facts or those deemed material in proffered instructions, containing correct principles of law, for purpose of forcing court to indicate opinion favorable to defendant as to effect of such facts, is improper as amounting to request for court's comment on facts disclosed by evidence. Pen.Code, § 1127.

14. Criminal law 🔑763(1)

Instructions bearing on weight to be attached to particular piece of evidence are properly refused. Pen.Code, § 1127.

15. Criminal law 🔑829(3)

In prosecution for kidnapping, rape and sodomy, where trial court correctly, fully and fairly instructed jury on definitions of such offenses, defendant's offered instructions, amplifying court's instructions by mere argument on question of use of force or violence or presence or absence of fear on prosecutrix' part, were properly rejected. Pen.Code, § 288a.

16. Criminal law 🔑829(3)

In prosecution for kidnapping, where such crime was succinctly defined in language of statute by court's instruction to jury, defendant's offered instruction to acquit, if prosecutrix went with defendant willingly and without any force, threats or violence on his part, was properly refused.

17. Criminal law 🔑769, 829(1)

The trial judge should clearly instruct jury on every principle of law applicable but is not required to repeat any of such principles, no matter how many separate instructions including them are asked.

18. Criminal law 🔑829(1)

Where jury is properly instructed on all phases of law applicable to facts in case, defendant is not entitled to other instructions on like matters in any particular phraseology.

19. Criminal law 🔑822(1)

Instructions to jury should not be considered singly, but in their entirety.

20. Criminal law 🔑782(9)

Instructions fully, fairly and correctly advising jury of kind, quality and degree of proof required before defendant may be convicted of any or all of charges against him are sufficient.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Charles E. Hill was convicted of kidnapping, rape and sodomy, and he appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., Frank W. Richards, Deputy Atty. Gen., and Fred N. Howser, Dist. Atty., Jere J. Sullivan and Robert Wheeler, Deputy Dist. Attys., all of Los Angeles, for plaintiff and respondent.

Henry Poyet, of Los Angeles, for defendant and appellant.

WHITE, Justice.

The District Attorney filed an information in the Superior Court of Los Angeles County wherein the defendant was charged with the commission of five felonies as follows:

Count 1: Kidnapping;

Counts 2 and 5: Rape;

Counts 3 and 4: Violation of Section 288a of the Penal Code.

Trial before a jury resulted in the conviction of defendant on all five counts. A motion for a new trial was denied and defendant was sentenced to state prison for the terms prescribed by law on all counts, the sentences to run concurrently.

From the judgment of conviction and the order denying motion for a new trial, defendant prosecutes this appeal.

Because the sole ground of appeal is that the court erred in refusing certain instructions offered by the defendant, we do not deem it necessary to here recite in detail the sordid circumstances which gave rise to this prosecution. The evidence pertinent to a consideration of this appeal may be thus epitomized:

Between 9 and 10 o'clock on the evening of September 20, 1945, the prosecutrix, a woman divorced from her husband and the mother of two children aged 8 and 6 years, was sitting with a male companion in the latter's parked automobile on a public scenic drive in the Palos Verdes Hills in Los Angeles County. Defendant approached the automobile on the side where the man was sitting behind the steering wheel, opened the door and shoved an object into the man's side, whereupon the latter told the prosecutrix seated beside him to run away. She ran about half way down the hill on the asphalt road, turned up a bank to a bush behind which she secreted herself. She heard the defendant following her, and when he too turned running off the road she ran to the other side of the bush, down the bank, and across the road. The defendant continued to pursue her, calling out, "You stop or I'll kill you."

When the defendant was within 8 or 10 feet behind her, the prosecutrix stopped. Walking up to him she observed that he had a flat, gunmetal-colored revolver in his right hand. When the prosecutrix inquired of the defendant what he wanted, he told her to "shut up"; that he was not a "cop" and that "you will find out what I want". The defendant then turned the prosecutrix around, put the gun "behind my heart, in my back" and asked her to go back to the automobile or "I'll plug you here". The prosecutrix testified that she was "desperately afraid" of the defendant's gun, and that "by the tone of his voice and the way that he was acting" the prosecutrix testified she "didn't doubt for one instant" that he would shoot her if she failed to obey him.

With the defendant behind her, holding her left arm, and with the gun pressed against her back, the prosecutrix, in obedience to the defendant's command, and with him "pushing and shoving" her, proceeded back to her companion's automobile.

When the defendant and prosecutrix arrived at her companion's automobile he was not in sight and did not respond to calls for him uttered by the prosecutrix. There is testimony that the defendant was very nervous and highly excited, that he insisted to the prosecutrix that if she did not get her male companion back to the car he would shoot her then and there. At this time, defendant was still holding his gun to her back. After the prosecutrix, at the defendant's command, made further outcries for her companion, the latter came from behind the car with his hands up.

Defendant told him that he did not want money but wanted the woman and that he would kill her companion if the latter came any closer. Defendant threatened "very often" to kill the companion of the prosecutrix and finally instructed him to stay at the car for fifty minutes and to then come to a spot at the end of the road where he would find his automobile keys.

The defendant again emphasized that if the man did not remain at the automobile he, the defendant, would kill the prosecutrix. During all of this talking, the defendant continued to keep his gun pressed to the prosecutrix' back, and, according to her testimony, she was at all times in fear and apprehension that defendant would shoot her companion if she and the defendant stayed at the automobile. She thereupon said to the defendant, "If it is me you want, let's go."

After proceeding some fifty feet, the defendant turned the prosecutrix off the road, took her across a field and up a hill. He inquired of her as to whether she was married to her companion, to which she replied in the negative, and told the defendant her companion was her boss.

At the top of the hill, about a block from the aforesaid automobile, the defendant commanded the prosecutrix to get in the front seat of another automobile and drove off with her, circling around the hills for "a long time". All of this time, the prosecutrix testified, she was trying to talk to the defendant but that the latter was "very brutal in his voice" telling her that he did not intend to bring her back as she would "squeal" on him and that, therefore, he would kill her where they were. According to the testimony of the prosecutrix, her one thought was to convince the defendant that she would not "tell on him" and she so stated to him. She thereupon suggested that she and the defendant go to a beer parlor or to his apartment, which invitation the defendant refused. She then told the defendant of her children. During all of this time, according to her testimony, the prosecutrix was frightened "practically out of her wits". While in the automobile the defendant kept his gun in the front of his unbuttoned shirt. He drove around the hills for about 30 minutes, never on the highway, and then drove the car off into and across a large Decalite pit hewn from the side of a hill, and to a lonely spot overgrown with weeds with room for just one automobile going one way. There were no houses or people around nor were any house lights to be seen. At this point the defendant said, "Here is where I get some of that loving". At defendant's command, made while he had a gun in his hand, the prosecutrix practically disrobed. She testified she did so because of her fear of the defendant and the thought that he would kill her if she refused. Thereupon, defendant consummated the acts forming the basis of counts 2, 3, 4 and 5. After the consummation of the aforesaid acts, defendant stated to the prosecutrix that she was "pretty nice" and that he wanted her address and telephone number. Fearful of consequences that might ensue if she refused this request, she gave the defendant the requested information as well as the name of the place where her former husband had worked and also the address of her companion. Defendant stated to the prosecutrix that he could probably get her a better job than she had. He then drove her past her house and, at about 11 o'clock, to within half a block of her sister's house.

Defendant told the prosecutrix that if she reported him to the police, he would kill her or disfigure her by throwing acid upon her when he got out of prison. He further told her that he would be back in four or five nights and that he intended to keep in touch with her. After that he compelled her to kiss him, whereupon she turned and walked to her sister's house while the defendant drove away. Immediately upon admission into her sister's house the prosecutrix made complaint of the defendant's conduct. The prosecutrix was then driven by a friend Gene Baker back to the hills where they found the companion of the prosecutrix circling about with his car. The prosecutrix testified that she was then driven home and did not call the police immediately because she was "too mentally sick".

The following morning, at about 11:50 o'clock, the defendant telephoned the prosecutrix at her house. He wanted to see her again, but she told him she was too tired and nervous and that she was having a birthday party next day, Saturday, for her little boy. Defendant insisted upon seeing her Sunday, to which she agreed. Immediately after this telephone conversation, the prosecutrix communicated with the police. She testified that she was ill and went to bed where she stayed until the next morning, September 22, when she consulted her family physician. Upon her return from the doctor's office, the prosecutrix observed the defendant drive by her house smiling at her. Shortly thereafter he telephoned to the prosecutrix saying that he was scared, was getting nervous, had to see her right away, and would be over in five minutes. According to the testimony of prosecutrix, she agreed to his coming, in order to aid in his apprehension. Immediately after this conversation, the prosecutrix again telephoned the police department. In less than five minutes, the defendant arrived and a few minutes thereafter the officers were on the scene. The defendant was taken into custody. The prosecutrix went out to the police car and identified defendant as her assailant. At the trial the prosecutrix identified the gun that the defendant pressed against her back and which, at times, he carried in his shirt, and also another gun which the defendant had in his automobile and had exhibited to her.

The male companion of the prosecutrix testified at the trial. He corroborated the testimony of the prosecutrix as to what occurred at all times when he was present.

On the day of the defendant's arrest, one Gene Baker testified that he saw the defendant drive by the prosecutrix' home twice and that, after the defendant parked in front of the home of the prosecutrix and upon the approach of Mr. Baker, he seemed about to drive away, the latter, with a shotgun, blew the rear tire off the defendant's automobile. At the time of his arrest, the defendant had with him a tear gas bomb, which was introduced into evidence. At the same time, defendant's Colt automatic with a shell in the firing chamber was found in the rear of the front seat cushion of his automobile, shoved down between the back cushion and the seat cushion with the butt protruding up, while a fully loaded clip of cartridges was found in the glove compartment. Also found in the vehicle was his fully loaded 30-20 revolver stuck down and just to the left of where the driver would sit in the car and between the front seat frame and the cushion.

Subsequent to his arrest, the defendant had conversations, in the presence of several persons, with a Los Angeles police officer, the Chief of Police of Torrance, and a Deputy Sheriff of Los Angeles County. While waiting in the automobile at the scene of his arrest, the defendant stated, "I'm the guy you are after * * *. I am the guy that had the girl up in the hills". At the Torrance Police Station the defendant stated that he had sexual intercourse with the prosecutrix at the Decalite pit and had her commit upon him an act of sexual perversion. As to the latter, when asked if he had to force her, he said, "I had to push her head down". At the Vermont Substation of the Sheriff's office, the defendant stated that at the Decalite pit he had engaged in an act of sexual intercourse with the prosecutrix, that he then committed an act of sexual perversion upon her, that he then had her commit a similar act upon himself, and that he then had another act of sexual intercourse with her. At this point the defendant was asked, "Was this all done by the girl's own free will?" to which the defendant replied, "I guess it was all by force."

At the trial, the defendant introduced the testimony of a private investigator who stated that on November 25, 1945, he saw a man take a woman from the apartment of the prosecutrix, drive her to the beach, where it appeared to him that "a loving affair was had in the automobile", but when the prosecutrix stood some 14 feet from the witness stand the investigator was not positive that she was the woman he had seen, nor could he identify the man. The witness admitted he might have confused the woman with the sister of the prosecutrix who was also in court and confronted him. The sister of the prosecutrix testified that it was she who had been driven to the beach, and the man who accompanied her testified that it was she and not the prosecutrix with whom he was keeping company and whom he took to the beach on the occasion in question, at which time the prosecutrix remained in her own apartment. The witness testified that in fact, the prosecutrix never at any time was in his automobile.

The defendant testified at the trial that as he drove by the car in which the prosecutrix and her male companion were sitting, he thought a fight was in progress, though he did not hear anything. After proceeding to the top of the hill he turned around, parked about 100 yards from the automobile in which the prosecutrix was seated, took his gun, flashlight and a handful of dirt. He testified that when he arrived at the car the man was in the back thereof buttoning up his trousers, that he threw the sand or dirt in the man's face when it appeared that the latter was going to rush him. Defendant stated that the prosecutrix ran away from the automobile, that he did not know her name to call her so he went after her. He testified that he encountered her and they walked back to the automobile, during which time the prosecutrix stated to him that the man she was with was her foreman, that she was desperately in need of money and that was the only reason she was out with him. According to the defendant, the prosecutrix asked him, "What do you want? Money?" to which he said, "No; I don't want money; I don't want a thing. I just thought you was in trouble." That the prosecutrix thereupon said, "You couldn't use some loving now, could you?" According to the defendant, he said, "Well, no, not hardly; I don't think so." To which, according to his testimony, the prosecutrix replied, "I can fix you up if you do."

Defendant testified that when they reached the automobile he pulled his gun when the male companion of the prosecutrix came from behind the automobile after she had called him. That the prosecutrix suggested that she and the defendant leave and not have any trouble. Defendant testified that he started backing away and she followed him and entered his automobile. That the prosecutrix suggested that they go to his apartment but that he said, "No, we can't go to my apartment. I know a place we can go to I guess." That he then drove to the spot in the Decalite pit where they, with her consent, engaged in an act of sexual intercourse. The defendant denied committing any acts of sexual perversion upon or with the prosecutrix. In detailing the manner in which he obtained her telephone number, he testified that they made an engagement to meet the following Sunday. In explanation of his telephone call on the following day, he said that it was with reference to his promise to obtain a position for her. He admitted driving by the home of the prosecutrix and exchanging smiles with her. He also admitted the telephone conversation with her and testified that she invited him to come over to her house, which he did. That he was there met by two men, one with a shotgun, that his rear tire was shot off, that he was knocked down by one of the men and shortly thereafter the police arrived and took him into custody.

While testifying that the officers were not "rough" in questioning him, the defendant at the trial could remember only "snatches" of the questions asked of him and the answers given by him because he said that he was ill, "half-way dizzy" and had "a terrific headache".

[1, 2] In urging a reversal of the judgments and order herein, appellant states, "When the evidence, as in this case, is of such an unusual and unique character, the court should extend themselves to see that juries have in mind these broad principles of law in simple and concise language as was offered in these instructions and should not be compelled upon their own to apply deductions and inferences which some general instructions may inferentially be held to apply when profound and intricate theories must be supplied in order to make them appear legally sufficient. It is our contention that none of the instructions which the court gave to the jury would direct a jury to a consideration of the defendant's defense." As to what appellant's defense was, it would appear from a reading of the record that in substance, as reflected by his own testimony, his defense was that the prosecutrix voluntarily left her male companion, willingly accompanied the defendant whom she had never before met, to a lonely spot in the hills, where she made advances to him and solicited from him acts of sexual intercourse, or as stated in appellant's brief, "he of course fell for seduction, was seduced and finds himself in his present position". As to the charges of kidnapping and violations of Section 288a of the Penal Code, he denied that he committed any of the acts forming the gravamen of these offenses. The evidence introduced by the prosecution and evidently believed by the jury, was amply sufficient to prove the offenses charged. Indeed, it is not here contended that the evidence fails to support the guilty verdicts rendered. True, the evidence introduced for the defense created a conflict, but that was a question addressed to the triers of fact for solution and with their determination we can not interfere.

It therefore becomes our duty to determine whether the instructions given fully, fairly and correctly advised the jury of the law applicable to the issues presented by the information and pleas of the defendant or raised by the evidence.

[3] Appellant's first refused instruction pertains to the presumption of innocence, the doctrine of reasonable doubt, and emphasizes the fact that the presumption of innocence is not a mere form to be lightly disregarded, but is an essential and substantial part of the law of the land. The court instructed the jury on the doctrine of reasonable doubt and the presumption of innocence in the language of Section 1096 of the Penal Code. Section 1096a of the same code specifically provides that no further instructions on these subjects need be given.

[4] The second refused instruction was to the effect that a defendant is entitled to the individual opinion of each juror. This instruction was properly refused because it was covered by another instruction which advised the jury that they must reach a verdict just to both sides "and which will express the individual opinion of each juror". See also People v. Daskam, 123 Cal. App. 545, 546, 11 P.2d 670.

[5] The next rejected instruction to the effect that the law presumes a defendant to be of good character was properly refused. There is no such presumption. Peo-

ple v. Griffith, 146 Cal. 339, 345, 80 P. 68; People v. Conte, 17 Cal.App. 771, 787, 122 P. 450, 457; People v. Grandi, 33 Cal.App. 637, 642, 165 P. 1027; People v. Hopper, 42 Cal.App. 499, 502, 183 P. 836; People v. Oakleaf, 66 Cal.App. 314, 317, 226 P. 24. The court did instruct the jury that the defendant was presumed to be innocent until his guilt was established by evidence beyond a reasonable doubt.

[6] A defendant's good reputation as to traits involved in the charges against him, if proved, should be weighed as any other fact established. People v. Griffith, supra, 146 Cal. at page 345, 80 P. 68.

In the instant case, such evidence was offered and the court instructed the jury that "evidence of good character is evidence relevant to the question of whether the defendant is guilty or not guilty, and is to be considered by you in connection with the other facts and circumstances in the case. Such evidence may raise a reasonable doubt in a case in which otherwise no such doubt would exist * * *".

[7] The fourth and fifth instructions refused pertained to the credibility of witnesses. For the reason that in lengthy instructions the court fully covered this subject, defendant's proffered instructions, which in great part amounted to mere repetition and argument, were properly refused.

[8, 9] Appellant offered instructions Nos. 7 and 16 to the effect that the opinion or remarks of the deputy district attorney that the defendant is guilty, or any statements of counsel, should not be considered by the jury. These were properly refused. It is not contended and the record does not disclose that the deputy district attorney expressed any such opinion or made any such remarks. Furthermore the court instructed the jury that they should be careful not to regard statements by counsel on either side concerning the facts of the case as evidence.

The case of People v. Knight, 44 Cal.App. 2d 887, 893, 894, 113 P.2d 226, is authority for refusal by the court of defendant's proposed instructions pertaining to the credibility of appellant as a witness in his own behalf. Further, the court fully instructed the jury on the credibility of witnesses.

Instructions offered by the defendant numbered 6, 9, 10, 11, and 13 covering the doctrine of reasonable doubt and the presumption of innocence were properly refused because, as heretofore stated, both doctrines were clearly and fairly presented to the jury in other instructions.

[10] Defendant's instruction No. 14 to the effect that the filing of an information did not constitute evidence of guilt was fully covered in another instruction by which the jury was admonished that, "The information is merely the formal charges against the defendant. It is not evidence and must in no degree be considered as such." The instruction given was taken from People v. Phillips, 56 Cal.App. 291, 294, 205 P. 40.

[11] Appellant complains of the refusal of the court to give his proferred instruction to the effect that if the evidence presented two sets of facts or circumstances, one tending to establish the defendant's innocence and the other his guilt, the jury should adopt that hypothesis tending to establish his innocence. No prejudicial error was committed in rejecting this instruction. The court fully covered this subject in other instructions. Furthermore, where the proof, as in this case, was not entirely or even substantially circumstantial, no error was committed in rejecting the instruction offered. People v. Savage, 66 Cal.App.2d 237, 247, 152 P.2d 240.

[12] Appellant also complains of the refusal of the court to give his proferred instructions Nos. 17 and 18 to the effect that such charges as rape and violation of Section 288a of the Penal Code are easy to make, and difficult to disprove, and that the jury must exercise the utmost care and caution in examining the evidence in cases of this kind and should view the testimony of the prosecutrix with caution. These instructions were properly refused because they were covered by another instruction in which the court admonished the jury that "charges of the nature involved in this case can easily be made and

are often difficult to disprove. I instruct you that it is your duty to examine with caution the testimony of the prosecuting witness." Furthermore, in the case at bar, where the evidence of the prosecution was credibly and impressively corroborated it would not have been prejudicial error had the court refused to give any cautionary instructions. People v. Roberts, 50 Cal.App.2d 558, 568, 569, 123 P.2d 628.

[13, 14] Other instructions offered by appellant were either varying forms of the statements of law, as presented in other instructions given by the court, and therefore needless repetition or they were mere arguments and, therefore, out of place. It is not proper to select certain material facts, or those which are deemed to be material, and endeavor to force the court to indicate an opinion favorable to the defendant as to the effect of such facts, by incorporating them into instructions containing a correct principle of law. Such practice amounts simply to a request for the court to comment on the facts as disclosed by the evidence. While Section 1127 of the Penal Code provides that the court "may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case", the same code section emphatically declares that "either party may present to the court any written charge on the law, *but not with respect to matters of fact* * * *". (Emphasis added.) Therefore, instructions bearing on the weight to be attached to a particular piece of evidence are properly refused.

[15, 16] In the instant case, the court correctly, fully and fairly instructed the jury on the definition of kidnapping, rape, and what constituted a violation of Section 288a of the Penal Code. Defendant offered instructions amplifying these instructions with what could well be referred to as mere argument upon the question of the use of force or violence or the presence or absence of fear on the part of the prosecutrix. Such instructions were properly rejected. For illustration, after the crime of kidnapping had been succinctly defined by the court in the language of the statute, what could be the virtue of following such definition with a statement that if the alleged victim went with the defendant willingly and without any force, threats or violence on his part, the jury should acquit?

[17] We do not deem it necessary to here set forth in detail some six other instructions offered by the defendant and refused by the court, for to do so would unduly prolong this opinion. Suffice it to say that a complete answer to the contentions advanced by the appellant herein with reference to instructions offered by him and refused by the court, is found in the case of People v. Bickerstaff, 46 Cal. App. 764, 190 P. 656, cited by appellant, wherein the Supreme Court in denying a petition for hearing, stated, 46 Cal.App. at page 775, 190 P. at page 661:

"We think it necessary to say, however, that we do not approve of all that is said in the opinion of the District Court of Appeal on the subject of the instructions given and refused.

"The opinion appears to approve the pernicious practice, sometimes indulged in by the trial courts, of repeating over and over again instructions couched in varying language, but embodying the same principle of law. This is especially prevalent with regard to instructions relating to the presumption of innocence, reasonable doubt, and the degree of proof required of the prosecution. Repetitions of this character are not necessary, and should be avoided as far as possible. Several of the instructions criticised in this case were given, in effect, in other instructions using somewhat different forms of expression, but having the same meaning. The trial judge should take care to give to the jury, once and in clear language, every principle of law applicable to the particular case. When he has done this, he is not required to repeat any of them, no matter how many separate instructions are asked which may include them. Such continual repetition tends to give undue emphasis to the particular point to which they may relate, and operates to confuse the jury in their consideration of the evidence."

[18-20] In the case with which we are here concerned, the court in its instructions defined the offenses of kidnapping, rape and violation of Section 288a of the Penal Code charged in the information. The court also defined an accomplice with reference to the charged violation of Section 288a and gave instructions on the presumption of innocence, reasonable doubt, credibility of witnesses, and the degree of proof required to warrant a conviction. The jury was also instructed to view with caution testimony of the prosecutrix, that the jury in determining the guilt or innocence of the defendant must not consider the fact that he was armed with a deadly weapon, unless the jury should find that such a weapon was actually used by the defendant in a threatening manner toward the prosecutrix and her male companion and as an element of force to compel the former to go with the defendant, against her will, and commit the acts included in the charges. The instructions given by the court sufficiently advised the jury of the law applicable to the issues confronting them. Where, as here, the jury was properly instructed upon all phases of the law applicable to the facts in the case, the defendant is not entitled to have instructions on like matters given in any particular phraseology. People v. Tedesco, 1 Cal. 2d 211, 220, 34 P.2d 467. Instructions should not be considered singly, but in their entirety. A reading of all the instructions given persuades us that the trial judge fully, fairly and correctly advised the jury as to the kind, quality and degree of proof required before appellant could be convicted of any or all of the charges lodged against him. This is all the law requires. People v. Curtis, 36 Cal.App.2d 306, 322, 98 P.2d 228.

We have now given consideration to all the reasons and arguments advanced for a reversal, and having fully examined and considered the whole record, have found no reason for setting at naught the result arrived at in the court below.

The judgments and the order denying defendant's motion for a new trial are and each is accordingly affirmed.

YORK, P. J., and DORAN, J., concur.

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76 Cal.App.2d 288

BEEN et al. v. LUMMUS CO. et al.

Civ. 15301.

District Court of Appeal, Second District, Division 2, California.

Oct. 2, 1946.

1. Negligence ⚷136(25)

Whether existence of a static agency or of a moving force is the proximate cause of an event is to be decided largely on the facts, and the determination is a question for the jury.

2. Negligence ⚷134(11)

Proximate cause of an accident may be inferred from circumstances if they are such that different minds might reasonably draw different conclusions.

3. Negligence ⚷136(25)

The determination whether there was an intervening efficient cause that prevents an agency from being the proximate cause of an accident is the function of the triers of fact.

4. Automobiles ⚷308(6, 10)

Whether invitee which engaged in the performance of a contract on land of oil company, and which stretched across a private roadway a five-eighth inch cable without a warning, into which truck in which oil company's employees were riding was driven, resulting in injuries to employees, was guilty of negligence that was proximate cause of injuries was for jury.

5. Negligence ⚷22

Liability for carelessly handling dangerous instrumentalities arises from failure to use due care, and such failure arises when the circumstances show that actor had reason to know that his act was likely to produce injury to any person in the lawful pursuit of his own business and in the exercise of reasonable care.

6. Negligence ⚷25

When human life is at stake, rule of due care and diligence requires that, without regard to difficulties or expense, every precaution must be taken reasonably to assure the safety of any persons lawfully coming into immediate proximity of a dangerous agency or device.

7. Negligence ⚷59

One who causes the use of a dangerous instrument in a negligent manner, or under such circumstances that he has reason to know it is likely to produce injury, is responsible for the natural and probable consequences of his act to any person not at fault, and that which a man foresees is, as to him at least, natural and probable.

8. Negligence ⚷22

The reasonable care required of one using a dangerous instrument is the degree of care commensurate with the apparent danger.

9. Negligence ⚷93(1)

Alleged negligence of truck driver could not be imputed to his fellow employees who were riding in the truck.

10. Appeal and error ⚷934(1)
Judgment ⚷199(3)

To sustain a verdict against a motion for judgment notwithstanding a verdict, an appellate court or trial court is obliged to find only sufficient substantial support for verdict after excluding all unfavorable evidence and resolving all conflicts in favor of plaintiff and considering testimony and its legitimate implications in the light most favorable to verdict.

11. Judgment ⚷199(1)

The power to grant a judgment notwithstanding the verdict is no greater than the power to grant a nonsuit.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Simeon D. Been and Winfield S. Husted against the Lummus Company, a corporation, and others to recover for injuries sustained by the plaintiff when truck in which plaintiffs were riding struck a steel cable of the named defendant. From a judgment for the named defendant notwithstanding verdict for plaintiffs, the plaintiffs appeal.

Judgment reversed with instructions to enter judgment in conformance with verdict.

Samuel A. Rosenthal, of Los Angeles, for appellants.

Syril S. Tipton, of Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for decision is whether there was substantial evidentiary support for verdicts returned in favor of appellants for damages in their joint action for personal injuries, the trial court having entered judgment for respondent non obstante veredicto. Verdicts having been returned in favor of all the defendants except the Lummus Company, it moved for judgments notwithstanding the verdicts. Its motion having been granted, plaintiffs apppeal.

Appellants were employees of Richfield Oil Company, herein referred to as Richfield, at its plant near Wilmington. The area covered by the plant included about 40 acres on which were situate warehouses, tool houses and tanks. Also, it was traversed by numerous roadways used by Richfield's trucks in conveying men and materials from one point to another to make repairs and do construction work. Over one of these roads of hard surface and 25 feet in width the Richfield truck conveying appellants was traveling southerly about 5 p. m. on March 22, 1944. It had proceeded from the tool house towards a point at which they were to make certain repairs when suddenly the auxiliary cab in which appellants were seated was jerked to the ground causing the injuries complained of. The agency which thus interrupted the progress of the moving vehicle was a ⅝-inch cable which extended from the winch of an A-frame truck of respondent, standing on the east side of the road, to a steel anchorage or "dead man" 50 feet west of the road. To the same "dead man" and above the small cable was tied a two-inch cable which extended to a derrick used in connection with the construction of a thermal catalytic cracking unit east of the position of the A-frame truck. Within one hour prior to the arrival of the Richfield vehicle the small cable had been suspended and neither appellants nor Wilson, the driver of the truck, knew it was there. They were traveling at 15 miles an hour. No men were visible near the standing truck or the road although Wilson's view was unobstructed as he traveled the 200 feet north of the cable. There was nothing to warn him of the presence of the small cable except the cable itself, and as to it his vision was evidently blurred by the splash of green projected by a building near the road 100 yards south of the cables.

[1-8] Whether the existence of a static agency or of a moving force is the proximate cause of an event is to be "decided largely on the special facts" of the given case. Louisiana Mutual Insurance Company v. Tweed, 74 U.S. 44, 19 L.Ed. 65. The determination of what was the proximate cause of a result is a question for the jury. Clark v. E. I. Dupont de Nemours Powder Co., 94 Kan. 268, 146 P. 320, L.R.A.1915E, 479, Ann.Cas.1917B, 340; Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431, 76 A.L.R. 676. This arises from the fact that the facts of different cases are so various that each presents a question of the amount and degree of care to be used, precautions to be observed and foresight to be exercised. Union Traction Co. of Indiana v. Berry, 188 Ind. 514, 121 N.E. 655, 658, 124 N.E. 737, 32 A.L.R. 1171. Proximate cause may be inferred from circumstances if they are such that different minds might reasonably draw different conclusions. And it is the function of the triers of fact to determine whether there was an intervening efficient cause. Wells v. Lloyd, 6 Cal.2d 70, 86, 56 P.2d 517. If an owner is obliged to keep his premises in safe condition and to give adequate warning of a concealed defect in order to avoid injuries to his invitees, then surely the factual determination as to whether an invitee engaged in the performance of a contract was guilty of negligence in suspending a ⅝-inch cable across a private roadway is a function of the jury. Liability for carelessly handling dangerous instrumentalities arises from failure to use due care, and such failure arises when the circumstances show that the actor had reason to know that his act was likely to produce injury to any person in the lawful pursuit of his own business and exercising reasonable care. 38 Am.Jur. 743, sec. 85. When human life is at stake the rule of due care and diligence requires that without regard to difficulties or expense every precaution be taken reasonably to assure the safety and security of any person lawfully coming into the immediate proximity of the dangerous agency or device which is a peril to others. Bessemer Land & Improvement Co. v. Campbell, 121 Ala. 50, 25 So. 793, 77 Am.St.Rep. 17; Ashby v. Philadelphia Electric Co., 328 Pa. 474, 195 A. 887, 889. One who causes the use of a dangerous instrument in a negligent manner, or under such circumstances that he has reason to know it is likely to produce injury, is responsible for the natural and probable consequences of his act to any person not at fault. 38 Am.Jur. 743, sec. 85. That which a man foresees is, as to him at least, natural and probable. 38 Am.Jur. 707, sec. 58. No less a degree of care than that which is commensurate with the apparent danger is reasonable. Union Traction Co. v. Berry, supra.

Respondent argues that because Wilson knew (1) that the construction of the catalytic cracking plant had caused the suspension of the larger cable, (2) that the Lummus employees were on the premises and using a truck with a winch and cable attachment, and (3) that during respondent's operations on the premises he had placed warning signs on the roadway, he was therefore negligent in driving against the small cable and that his negligence was the sole proximate cause of the injuries. But Wilson's testimony was that whenever an open ditch or a road was constructed or men were working in a certain area he "barricaded and lighted the roadway" or placed out warning signals. While he knew the larger cable extended across the road at the location of the A-frame truck, he also knew that his own truck and auxiliary cab had sufficient clearance for its safe passage. Although he observed respondent's truck standing beneath the big cable while he traveled the last 200 feet, there was no barricade, the men were concealed from his view, the small cable was not visible to him and no one had notified him that it had been or was to be suspended. The presence of a flag on the two-inch cable was not essentially a notice that another cable had been strung across the road and that it constituted a peril to the Richfield truck or its occupants. A flag on a roadway is generally deemed to be a warning to watch out for workmen or ditches or obstructions that might be encountered by an approaching vehicle. The jury reasonably inferred that the presence of the A-frame truck and the flag suspended from the large cable were not sufficient notice of the presence of the small cable. From such an inference the finding of Lummus' negligence was a logical sequitur.

Respondent at length arrays the items that might have been seen by Wilson and what they should have indicated to him; but those were for the consideration of the jury which found from all the evidence against respondent's contentions. Such finding being supported by substantial evidence was conclusive support for the judgment as against the motion of respondent.

[9] Inasmuch as respondent's negligence was a proximate cause of the accident it was the sole proximate cause, since the failure of Wilson to see the small cable cannot be imputed to appellants. It is a familiar rule that negligence of the driver of a truck is not to be imputed to its occupants because they were his fellow employees. Lagomarsino v. Market Street R. Co., 202 Cal. 474, 261 P. 465; Ostertag v. Bethlehem Shipbuilding Corporation, 65 Cal.App.2d 795, 801, 151 P.2d 647.

[10, 11] Respondent's position is in effect a demand that this court consider the evidence, balance the facts and inferences favorable to appellants against those which support respondent's thesis and from a preponderance of the evidence determine that respondent's act was not a want of ordinary care and that the negligence of Wilson was the sole proximate cause of appellants' injuries. Such is the function of neither the appellate court nor of the trial court on a motion for judgment notwithstanding the verdict. To sustain a verdict as against such a motion the court is obliged to find only sufficient substantial support for it after excluding all unfavorable evidence and resolving all conflicts in favor of the plaintiff and considering the testimony and its legitimate implications in the light most advantageous to the verdict. Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579; Shannon v. Thomas, 57 Cal.App.2d 187, 193, 134 P.2d 522. The jurisdiction to grant such a motion is no greater than the power to grant a nonsuit. Neel v. Manning, Inc., 19 Cal.2d 647, 649, 122 P.2d 576, Valentin v. La Societe Francaise, 76 Cal. App.2d 1, 172 P.2d 359.

Respondent's contention that it owed no duty to warn Richfield employees that it had strung the cable across a road which it knew was in frequent use by such employees does not strike a responsive chord. A small cable across a roadway slightly above the range of the vision of a truck driver is not necessarily an obvious peril. It was not proved that such cables were customarily suspended on the Richfield grounds. Its presence therefore cannot be assimilated to the existence of open ditches along or across the roads or of unguarded implements or conveyances. It is the rule that such hazards may not be left exposed to passersby entitled to travel without suitable barricades or warnings. If respondent as invitee might have assumed the premises to be reasonably safe for the passage of its truck along the Richfield roadways without risk of injury to its employees (Mendelsohn v. Van Herick, 133 Cal.App. 612, 24 P.2d 878), surely the reciprocal obligation was imposed upon respondent not to create hazards for appellants who were lawfully in the pursuit of their labors by suspending the 5/8-inch cable across a roadway on the Richfield grounds, at a height slightly above the head of a truck driver. To have done so without adequate notice or warning of its presence may be negligence, and if it is so found upon substantial evidence, and also that negligence proximately caused appellants' injuries, such finding must authorize a recovery for the plaintiffs.

The judgment is reversed with instructions to enter a judgment in conformance with the verdict.

McCOMB and WILSON, JJ., concur.

76 Cal.App.2d 379

PRUDENTIAL INS. CO. OF AMERICA v. SMALL CLAIMS COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 13082.

District Court of Appeal, First District, Division 1, California.

Oct. 8, 1946.

As Modified on Denial of Rehearing Nov. 7, 1946.

Hearing Denied Dec. 5, 1946.

1. Constitutional law 🔑268, 314

In civil and criminal cases the right to a hearing includes the right to appear by counsel, and arbitrary refusal of such right constitutes a deprivation of "due process of law".

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

2. Constitutional law 🔑314
Courts 🔑42(3)

The section of Small Claims Courts Act prohibiting the appearance of counsel is not unconstitutional as depriving litigant of "due process of law" since the act provides for appeal where a trial de novo with counsel may be had. Code Civ.Proc. § 117g.

3. Courts 🔑176

Under provision of Small Claims Courts Act that no attorney at law or "other person" than plaintiff and defendant shall take any part in prosecution or defense of such litigation, a corporation is a "person" and, since corporations can only appear through natural persons, proper natural person may appear to prosecute or defend such claims and such proper person is not an "other person" excluded by the Act. Code Civ.Proc. §§ 17, 117g; Civ.Code, § 341(1); Const. art. 12, § 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Other Person" and "Person".

4. Courts 🔑176

Under Small Claims Courts Act providing that no attorney or other person than plaintiff and defendant should take part in prosecution or defense of litigation, a corporation's directors and other officers, or manager, or any regular employee whose duties give him peculiar knowledge of the facts may appear to represent the corporation regardless of whether person appearing is an attorney. Code Civ.Proc. § 117g.

5. Constitutional law 🔑70(3)

The determination whether social benefits to poor litigant outweigh the slight inconveniences to wealthy one required to appear without counsel in small claims court is for the Legislature. Code Civ.Proc. §§ 117–117r.

6. Courts 🔑176

An associate of legal firm representing foreign insurance company in its life business in San Francisco, who was designated by company's vice president as "its agent and representative to appear on its behalf and defend" the action filed against company in small claims court, was not the type of representative of company that could appear for the corporation under the statute prohibiting an attorney from appearing in such litigation. Code Civ.Proc. §§ 117–117r.

* * *

Appeal from Superior Court, San Francisco County; George W. Schonfeld, Judge.

Proceeding for writ of prohibition by the Prudential Insurance Company of America against the Small Claims Court of the City and County of San Francisco, and Twain Michelsen, as Judge thereof, to restrain such court from proceeding with an action pending before it in which petitioner was the defendant. From a judgment of the superior court denying the writ of prohibition, the petitioner appeals.

Affirmed.

F. Eldred Boland, Burton L. Walsh, and Knight, Boland & Riordan, all of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., John J. O'Toole, City Atty., Reynold J. Bianchi, Deputy City Atty., and James Martin MacInnis, all of San Francisco, for respondent.

PETERS, Presiding Justice.

The Prudential Insurance Company of America appeals from a judgment of the Superior Court denying to appellant a writ of prohibition by which it sought to restrain the Small Claims Court of the City and County of San Francisco from proceeding with an action pending before it in which appellant was the defendant. The appeal presents several interesting and difficult questions of first impression involving the constitutionality and interpretation of the statutes creating the Small Claims Court, particularly as those statutes apply to corporations.

The facts giving rise to the controversy are as follows: Appellant is a New Jersey corporation qualified to do an insurance business in California. It has offices in several California cities, and in San Francisco has between 120 to 125 employees. In this city it has a manager, by name Clifford Henderson, who has also been designated as the agent of the company for the purpose of accepting service of process on appellant in this state. Some twelve employees of the company are subject to Henderson's immediate supervision. The company has regularly retained counsel in various cities in the state. In San Francisco, in all disputes growing out of life policies, the legal firm of Knight, Boland and Riordan has been the regularly retained counsel of such company for several years, and was such counsel during all times pertinent in the instant case. Burton L. Walsh is associated with that firm as a lawyer.

In May of 1945 an action was commenced in the Small Claims Court by a holder of a Prudential life policy with disability benefits naming appellant as defendant. This action involved the disability provisions of the life policy, and involved less than $50. By order appellant was directed by the court to appear and answer on a specified date. This order was served upon Henderson. Before the date fixed in the order appellant specially appeared in the Small Claims Court and moved to quash the service of summons, urging, for reasons substantially similar to those urged on this appeal and hereafter discussed, that that court had no jurisdiction over appellant. The motion was denied, whereupon appellant sought a writ of prohibition in the Superior Court. An alternative writ was issued and a full hearing had. The Superior Court denied the application and appellant has appealed.

From the evidence it appears that the same policy holder here involved had instituted a prior action in the Small Claims Court against appellant, and that in that action appellant sought to appear by its regularly retained counsel but had been refused permission to so appear. The result was a default judgment against appellant. After the action here sought to be restrained was instituted the legal firm involved sought and secured from a vice-president of the appellant the appointment of Walsh as the "agent and representative" of appellant to appear and defend the action. It is asserted in the petition that Walsh is the only agent or representative of appellant in California who has knowledge of all of the facts of the case or who has been authorized to appear on behalf of the company. The record shows, however, and the trial court found, that Walsh's only knowledge of the case comes from having possession of the files of the company relating to the case, that he has no other knowledge of the facts, and that these files were forwarded to him by the eastern counsel of the company. The petition alleges that the Small Claims Court will not permit Walsh to appear and defend the present action and that this will deprive appellant of its constitutional rights.

The statutory law relating to Small Claims Courts is to be found in the Code of Civil Procedure, § 117 through § 117r. The section primarily involved is § 117g, which provides: "No attorney at law or other person than the plaintiff and defendant shall take any part in the filing or the prosecution or defense of such litigation in the small claims court. * * *"

[1, 2] The first question presented is whether the prohibition against the appearance of lawyers renders § 117g unconstitutional. It is urged that depriving a litigant of the right of counsel is a violation of due process. There can be little doubt but that in both civil and criminal cases the right to a hearing includes the right to appear by counsel, and that the arbitrary refusal of such right constitutes a deprivation of due process. Roberts v. Anderson, 10 Cir., 66

F.2d 874; Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527; Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767; Steen v. Board of Civil Service Com'rs, 26 Cal.2d 716, 160 P.2d 816. But that does not mean that the legislature cannot create a Small Claims Court where informal hearings may be held without the assistance of counsel, as long as the right to appear by counsel is guaranteed in a real sense somewhere in the proceeding. It is obvious that the plaintiff cannot object, although he has no right of appeal, because he has elected to commence the action in the Small Claims Court. If he desires an attorney he can sue, even on these small claims, in the Justices or Municipal Courts. The defendant has no legal cause for complaint because if he is dissatisfied with the judgment of the Small Claims Court he has a right of appeal to the Superior Court where he is entitled to a trial de novo. Los Angeles Bond, etc., Co. v. Superior Court, 1 Cal.App.2d 634, 37 P.2d 159. In that court he and the plaintiff can, of course, appear by counsel. This satisfies the due process requirement.

That this is sound constitutional doctrine has been established by the United States Supreme Court in connection with the deprivation of a jury trial in small claims or conciliation courts. The leading case is Capital Traction Co. v. Hof, 174 U.S. 1, 19 S.Ct. 580, 43 L.Ed. 873, involving a federal statute relating to the duties of the justices of the peace in the District of Columbia. It was there held that the right to a common-law jury trial as guaranteed by the seventh amendment to the United States Constitution was not violated by a statutory provision allowing the primary trial of civil cases of moderate amount by a justice of the peace with or without a non-common-law jury, where the statute also allowed the parties the right to appeal to a court of record where a common-law jury could be had.

The same result was reached by the Supreme Court of Minnesota in Flour City Fuel & Transfer Co. v. Young, 150 Minn. 452, 185 N.W. 934, in upholding the constitutionality of the statute of that state creating the conciliation and small debtor's court, in which juries were barred. It was there held that "The constitutional guaranty is satisfied if a party is afforded a jury trial on appeal though not in the tribunal of primary jurisdiction" citing the Hof and other cases. 185 N.W. at p. 936, 150 Minn. at page 936. There is an interesting discussion of the purposes and background of such small debtor's courts in both the Hof and Young cases. See, also, notes in 11 Cal.Law Rev. 276; 1 Minn.Law Rev. 107; 34 Colum.Law Rev. 932.

The reasoning of these cases is clearly applicable here. Certainly the constitutional guaranty of a jury trial is as important as the constitutional right to appear and prosecute or defend by counsel. If the one constitutional right is not violated as long as a jury trial may be had upon appeal, the right to an appeal where a trial de novo with counsel may be had satisfies the other constitutional requirement.

This conclusion is in accord with general public policy. Justice should not be a rich man's luxury. The Magna Carta guaranteed that justice would not be denied or delayed. Ever since 1215 those interested in the administration of justice have struggled somewhat unsuccessfully to live up to that promise so far as the poor litigant is concerned. The delay and expense incident to litigation have long discouraged the attempts of the poor litigant to secure redress for claims meritorious but small in amount. These cases are relatively of as great importance to those litigants as those heard in our highest courts, but the expense of employing an attorney and paying normal court costs is more than the cause will bear. The solution to this problem arrived at not only by many states in the United States, but also in England and in many continental countries, has been to create small claims or conciliation courts where small claims may be prosecuted informally and without the cost, delay, or procedural difficulties incident to normal litigation. See in general Hughes v. Municipal Court, 200 Cal. 215, 252 P. 575; Leuschen v. Small Claims Court, 191 Cal. 133, 215 P. 391; discussion in 6 Cal.Jur.Supp. p. 832, § 246. If one of the litigants in such a court could employ counsel it would of necessity mean that the poor untrained litigant who could not afford to pay such costs would be at a disadvantage. That is the theory upon which our legislature, acting well within its powers to determine within constitutional limits the social and economic policies of the state, determined by the adoption of § 117g of the Code of Civil Procedure that lawyers should be excluded at the first trial of such cases. That policy has received the well-nigh universal approval of the public, the bar and the judiciary. As already held, that policy does not violate any constitutional provision.

[3] The next question to be determined is whether the statutes applicable to such small claims courts apply to corporations, i.e., may they sue or be sued in such courts? It will be remembered that § 117g of the Code of Civil Procedure provides that "No attorney at law or other person than the plaintiff and defendant" shall take any part in the prosecution or defense of such litigation. Thus the only "person" who may prosecute or defend such actions is the plaintiff or defendant. Is a corporation a "person" within the meaning of this section? There would normally be no difficulty with this question because § 17 of the Code of Civil Procedure expressly provides that "the word 'person' includes a corporation as well as a natural person." But, argues appellant, a corporation is an artificial entity separate and distinct from its officers or agents, and since § 117g prohibits any "other person" than the plaintiff or defendant from appearing, if a corporation is a "person" within the meaning of the section it is in fact prohibited from appearing at all. In other words, it is argued that the officers, agents, representatives and employees of a corporation are "other" persons within the meaning of § 117g. If this contention is sound the section would deprive corporations of the opportunity to appear and defend such actions, since the artificial entity cannot itself speak, and this would deprive corporations of due process.

The argument while ingenious is unsound. The legislature could not have intended such a strict and unreasonable construction of the words "other person" in the section. This is made apparent not only by § 17 of the Code, above quoted, but by other constitutional and statutory provisions as well. Article XII, § 4 of the Constitution, provides, in part, that "all corporations shall have the right to sue and shall be subject to be sued, in all Courts, in like cases as natural persons." Section 341(1) of the Civil Code provides that every corporation has power "to sue and be sued in any court." In 6A Cal.Jur. p. 1378, § 805, the problem, amply supported by case authority, is discussed as follows: "The Code of Civil Procedure, § 17, declares that the word 'person' includes a corporation as well as a natural person. By that code the law of procedure is general and not divisible into special schemes of procedure, one where a corporation is a party and another where natural persons are parties * * *." In the same volume at p. 1380, § 806, it is stated: "Jurisdiction, which in its broad sense is the power to hear and determine, and in its applied sense is the power to hear and determine the particular case as regards the parties therein, exists over actions by or against corporations in the same cases, and to the same extent, and is to be acquired in the same ways, as over actions between natural persons. The jurisdiction of courts is not made to depend upon the incorporate character of the parties and the venue is not jurisdictional, if no objection be made that it is improper * * *." See for an interesting discussion of the problem J. D. L. Corporation v. Bruckman, 171 Misc. 3, 11 N.Y.S.2d 741.

It must be apparent that when § 117g provides that only the plaintiff and defendant may prosecute or defend such actions, and prohibits any "other person" from so appearing, it did not intend to exclude, and by its language it does not exclude, a proper representative of the corporation from appearing or defending such actions. The contended for interpretation would disregard the provisions of the Constitution and the Civil Code above quoted. Since corporations can only appear through some natural person it is obvious that the proper natural person may appear to prosecute or defend such claims, and that such a proper person is not an "other person" excluded by § 117g.

There is a series of cases that it is argued compel the conclusion that a corporation under no circumstances may appear in a court of law in propria persona. Osborn et al. v. Bank of United States, 9 Wheat. 738, 6 L.Ed. 204; Aberdeen Bindery v. Eastern States P. & Pub. Co., 166 Misc. 904, 3 N.Y.S.2d 419; Finox Realty Corporation v. Lippman, 163 Misc. 870, 296 N.Y.S. 945; Mortgage Commission v. Great Neck Imp. Co., 162 Misc. 416, 295 N.Y.S. 107; Brandstein v. White Lamps, D. C., 20 F.Supp. 369; Mullin-Johnson Co. v. Penn Mut. Life Ins. Co., D. C., 9 F.Supp. 175; Bennie et al. v. Triangle Ranch Co., 73 Colo. 586, 216 P. 718; but see A. Victor & Co. v. Sleininger, 255 App. Div. 673, 9 N.Y.S.2d 323, and cases there cited. These cases in various factual and legal situations hold that a corporation under general legal principles can only appear in a court of record by and through an attorney, and may not appear and defend or prosecute through its officers or employees. Based on these cases appellant argues that since a corporation can only prosecute or defend legal actions through an attorney, and since attorneys are prohibited in the small claims courts, such corporations are denied representation. The obvious answer to this argument is that all of the above cases dealt with courts of record and dealt with general common-law principles. They all resolve around the general rule that a corporation in the absence of statutory authority, even in its own behalf, cannot practice law. None of them dealt with a statutory situation such as is here involved. Here we have a statute, § 117g, that expressly confers on corporations, as well as on other persons, the right to prosecute or defend such actions. At the same time it denies to corporations as well as to other litigants the right to appear in such actions by attorneys. Since a corporation can only speak through a natural person, it is apparent, therefore, that § 117g must be interpreted as conferring on corporations the right to appear through some representative other than an attorney. Thus, here, unlike the above cases, there is express statutory authorization for a corporation to appear in propria persona through some proper representative other than an attorney. This serves to distinguish all of the cited cases.

[4] Now who is a proper representative that may lawfully appear in such cases? Obviously the members of the board of directors and other officers should be permitted to so appear, and this is so whether or not they are attorneys. This follows because in such cases they are not appearing as an attorney but in their capacity as an officer, and represent the corporation in the same sense as an individual attorney may appear to defend or prosecute such actions as a plaintiff or defendant in such courts. In the present case the foreign corporation did not have an officer or member of its board in California. It did have, however, a manager of its life business, who was also its statutory agent for service of all legal process, in this state. He, quite clearly, can appear on behalf of the corporation to defend the action. Just who else should be permitted to appear on behalf of the corporation is not entirely clear and could well be a subject for legislative action. In the absence of such action it would appear just and proper that any regular employee, not directly employed as a lawyer, but whose duties give him peculiar knowledge of the facts of such cases, could appear to represent the corporation, and this is so whether or not he is an attorney.

[5] It cannot logically be argued that such a limitation on the corporate right to appear is unfair in that a large part of the time of busy and highly paid executives may be consumed in defending small claims asserted against their companies. The same argument could be made against forcing the individual to appear personally and thus consuming a portion of his valuable time that he might think could be more profitably spent elsewhere. The answer to the suggestion is that the legislature of this state, drawing on the experience of many European countries and of many American states, has determined that the social benefits to the poor litigant far outweigh the slight inconveniences to the wealthy one.

The determination of such a problem is for the legislature, and as long as that body stays within constitutional limitations, the courts cannot and should not interfere.

[6] The only other problem necessary to discuss is whether Burton L. Walsh, a duly licensed attorney, should be permitted to represent appellant in this action in the small claims court. Appellant claims that although Walsh is one of its attorneys he also had specific authority to represent the company as its "agent" in this case. As already pointed out, the record shows that Walsh is an associate of the legal firm that has been retained by appellant in a purely legal capacity to represent it in its life business in and around San Francisco. Neither Walsh nor any other member of the legal firm has ever attempted to represent the company, until this case, in any other capacity than that of attorney. In a prior action between the policy holder involved in the action in the small claims court, Walsh was denied the right to appear as counsel for this corporate appellant. The action here involved was then filed in the small claims court on May 14, 1945, and service was had on Henderson, the statutory representative and manager of appellant in San Francisco. On May 19, 1945, the legal firm representing appellant requested of appellant by letter that appellant give Walsh something in writing designating him as agent and representative of the appellant to appear and to defend this particular action. On May 23, 1945, a vice-president of appellant complied with this request by designating Walsh "its agent and representative to appear on its behalf and defend" this particular action and this particular action only. Walsh pleaded and testified that he was the only representative of appellant in San Francisco who had knowledge of the facts of the case, but this allegation and testimony was found to be untrue by the trial court. The finding was based on the evidence that there were over 120 employees of appellant in San Francisco, and upon Walsh's stipulation that his knowledge of the case came only from the files of appellant company that had been forwarded to him by the eastern counsel of the company and that he had no other knowledge of the case. The court also found, and these findings are also amply supported, that Walsh is not now and never has been an employee of appellant; that appellant has over 100 employees in San Francisco; that Henderson is the manager of appellant in San Francisco and its agent designated to accept service of process. Walsh admitted that the only compensation he would receive for acting as "agent" of the corporation in this case would be the money he received as an associate of the law firm with which he is associated.

Under these circumstances it is too clear to require extended comment that Walsh was not the sort of representative of appellant permitted to appear for it under § 117g as heretofore interpreted. He was in law and in fact nothing more than the attorney for appellant, and as such prohibited from appearing for the company under the law. His purported "agency" was nothing more than an obvious attempt to circumvent the law prohibiting the appearance of attorneys in the small claims court. As already pointed out, one of the main purposes of the legislature as expressed in the statute is to restrict the proceeding to the actual litigants and their witnesses and to prohibit either side from using a representative advocate such as an attorney. To allow one of the litigants in such actions to gain the advantage of legal representation in the manner here attempted would contravene the clear purpose and intent of such statute. That cannot be permitted. Walsh was not the type of representative of the company that may appear lawfully for such corporations under the rules heretofore discussed.

The judgment appealed from is affirmed.

WARD, J., and SCHOTTKY, J. pro tem., concur.

Hearing denied; SHENK, EDMONDS, and SCHAUER, JJ., dissenting.

MAZZERA v. WOLF et ux. *

Civ. 7278.

District Court of Appeal, Third District, California.

Oct. 10, 1946.

Rehearing Denied Nov. 6, 1946.

Hearing Granted Dec. 5, 1946.

1. Joint adventures ⚷1
Partnership ⚷1

A "partnership" is the association of two or more persons for the purpose of carrying on business together and their joint participation in management and control of such business is an essential element of the partnership and the same element is necessary to constitute the parties "joint adventurers." Civ.Code, § 2400.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Adventurer" and "Partnership".

2. Frauds, statute of ⚷74(1)
Partnership ⚷20
Trusts ⚷103(1)

Oral agreement between plaintiff and defendants, each owning a lot on either side of lot to be purchased but having no interest in or business connection with operations of the other, that defendants should purchase lot and sell undivided one-half interest therein to plaintiff was unenforceable under statute of frauds and created no partnership or confidential relationship and hence purchase of lot by defendants with their own funds and for their own benefit and refusal to sell half interest to plaintiff gave rise to no constructive trust in favor of plaintiff. Civ. Code, §§ 852, 1624, subd. 4, 2400, 2401(2); Code Civ.Proc. § 1973, subd. 4.

3. Trusts ⚷86, 107

Party to agreement to join in purchase of land has no enforceable right to claim the benefit of purchase by other party to agreement unless he can establish a resulting trust growing out of use of his money in making the purchase, or a constructive trust based upon fraud of the other in procuring the title, or abuse of some confidential relationship, and mere breach of agreement that he may share in benefits of the purchase is not fraud in obtaining the title and will not give rise to a constructive trust.

◆

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Suit by Harry A. Mazzera against Ed Wolf and wife for a decree that defendants hold title to undivided one-half interest in described realty in trust for plaintiff, compelling defendants to convey such undivided one-half interest to plaintiff upon payment of one-half of defendants' expenditures, and quieting plaintiff's title to such interest. From a judgment in favor of defendants, plaintiff appeals.

Judgment affirmed.

Gumpert & Mazzera and Charles A. Zeller, all of Stockton, and C. Ray Robinson, of Merced, for appellant.

Oscar C. Parkinson, of Stockton, for respondents.

ADAMS, Presiding Justice.

Appellant herein alleged in a complaint filed in the Superior Court of San Joaquin County that on or about April 19, 1944, he and defendants orally agreed that defendants should purchase and take and hold title to a certain lot in Stockton, for the joint account and mutual benefit of plaintiff and defendants; that defendants were then to convey to plaintiff an undivided half interest therein upon payment to them of one-half of all legitimate expenditures made by defendants in consummating the purchase; that pursuant to said agreement defendants purchased the lot, plaintiff tendered to them the said one-half of the costs thereof, but that defendants refuse to accept said tender or to make conveyance. In a second count plaintiff alleges ownership and right to possession of an undivided one-half interest in said lot. His prayer is that it be decreed that defendants hold title to an undivided one-half interest in trust for plaintiff, that upon payment to them of one-half of their expenditures they be compelled to convey such undivided one-half interest to plaintiff, and that plaintiff's title to such interest be quieted. Defendants demurred to said complaint and said demurrer having been overruled, answered thereto, denying the aforesaid allegations except that they admitted they had purchased the lot, that plaintiff had requested a conveyance of an undivided half interest therein and that his request had been refused.

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* Subsequent opinion 183 P.2d 649.

After trial by the court without a jury, findings of fact were filed, as follows: At and prior to April 19, 1944, the lot in controversy was owned by one Gilbeau. Plaintiff owned improved real property bordering it on one side. Defendants owned similar property on the opposite side, upon which Wolf was operating a business, neither party having any interest in or business connection with the operations conducted by the other. On April 19, 1944, plaintiff and Wolf met casually upon the lot in suit, and in the course of a general conversation plaintiff proposed to Wolf that the latter endeavor to purchase the lot, taking title in his own name, and that they would then "go fifty-fifty" in the property, each taking an undivided one-half interest. To this proposal Wolf assented. Mrs. Wolf was not present, was not told about the conversation, and did not know it had taken place until served with process in this action. Wolf took no steps toward the purchase of the property until October, at which time Gilbeau wrote to him urging him to make an offer for the lot. Wolf offered $2,500 which offer was rejected, and thereafter offers and counter-offers having been made defendants agreed to pay $4,500 for the property, and in February, 1945, secured a deed thereto, making payment of the $4,500 out of their own funds. Subsequently plaintiff offered to pay Wolf one-half of the purchase price and costs of acquisition and demanded a conveyance of an undivided half interest, which was refused.

Conclusions of law from these findings were that the conversation between plaintiff and Wolf on April 19 "did not create an enforceable contract because same was not in writing"; no partnership existed between plaintiff and defendants or either of them and the conversation of April 19 did not effectuate a partnership; Mrs. Wolf did not authorize her husband to act for her in connection with said property; the oral agreement is barred by section 1624, subd. 4, of the Civil Code, and section 1973, subd. 4, of the Code of Civil Procedure; no trust was created by said conversation or the conduct of the parties; and defendants are entitled to have their title quieted as against the claims of plaintiff.

From a judgment in favor of defendants plaintiff has perfected this appeal. In his opening brief before us appellant asserts that this action was commenced "to establish a constructive trust and a partnership interest," in the property described; that the agreement in the case "had the effect of making the respective parties partners in the enterprise of buying and holding the property which was the subject of the agreement; that the existence of the relationship created by virtue of the agreement, placed the respective parties in confidential relations toward each other with respect to the property in question thus making the respondent Wolf a trustee with respect to his negotiations with respect to the purchase of the property and his purchase thereof"; and in his closing brief states that he does not rely upon an express or resulting trust. Also he submits that the entire case and the legal problem involved is "completely disposed of" by the case of Koyer v. Willmon, 150 Cal. 785, 90 P. 135.

Respondents challenge appellant's assertion that the facts in the Koyer case are the same as those in the instant case, assert that plaintiff's action is barred by the statute of frauds, that there can be no recovery on the theory of an express trust, a resulting trust or a constructive trust, that no partnership between plaintiff and defendants was created, and, finally, that the alleged agreement cannot be enforced specifically for the reason that Mrs. Wolf was not a party to it and the property was purchased with community funds.

Section 1624 of the Civil Code provides that a contract "for the sale of real property, or of an interest therein" is invalid unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent.

Section 1973 of the Code of Civil Procedure is to the same effect, and further provides that evidence of the agreement cannot be received without the writing or secondary evidence of its contents. Section 852 of the Civil Code provides that no trust in relation to real property is valid unless created or declared (1) by a written instrument subscribed by the trustee or by his agent thereto authorized by writing; (2) by the instrument under which the trustee claims the estate affected, or (3) by operation of law. Section 2400 of the Civil Code defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit"; and section 2401, subd. (2), of that Code provides that "Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property."

Appellant impliedly admits that if the oral agreement which he relies upon did not create a partnership or create a confidential relationship between the parties it could not be enforced or proven, because of the Statute of Frauds. His contention therefore seems to be that the oral agreement to convey real property, though ineffective for that purpose because of the statute, may, nevertheless, be construed as creating a partnership—which may be created orally—that the resulting partnership relationship creates a confidential relationship which makes defendant a constructive trustee and compels him to do under the oral contract just what the Statute of Frauds says he may not be compelled to do under an oral contract, to wit: make a conveyance of real property. He thus, in effect, argues that the oral agreement creates a partnership agreement the enforcement of which would result only in a tenancy in common between the parties which section 2401(2) of the Civil Code provides does not constitute a partnership.

We are of the opinion that to so hold would be to destroy the effect of the Statute of Frauds; and we are further of the opinion that Koyer v. Willmon, supra, relied upon by appellant, does not so hold. While there is certain language used in the opinion in that case which if isolated from the context may give some support to appellant's contention, a reading of the whole opinion makes the decision clearly inapplicable to the facts in the case before us. There the question before the Supreme Court was whether a nonsuit was properly granted. The evidence in the case, which was brought up in a bill of exceptions, showed that prior to the particular transaction plaintiff and defendant had often had business dealings together, and their relations were intimate. Plaintiff had been in the habit of buying property and letting the title stand in the name of Willmon. He testified that on the day he brought suit he had recorded deeds made to him by Willmon for property which had stood in the latter's name for over a year, and that they had had other transactions in which Willmon had bought land in his own name for plaintiff. It also appears that Willmon made the proposition to Koyer that they buy a parcel of land on the San Pedro water front which he thought was good. They talked over the proposition, consulted maps and secured advice as to whether they could maintain the water frontage if filled in or washed out; and they visited the land. Originally one parcel, consisting of three lots, was under consideration, but plaintiff discovered another, lot 14 in block 93, just beyond the first parcel, which they agreed they would have to have in order to "control the situation"; and they discussed its possibilities for the purpose of putting in a pier. It was then agreed that they would buy both parcels, and the first one was purchased by Willmon through agents, and, as agreed as to the whole property, title was taken in the name of Lydia B. Shields and both parties paid a part of the deposit, and eventually the balance due. On returning to Los Angeles after visiting the property, plaintiff secured the name of the record owner of lot 14, and defendant agreed to write to her. Later defendant reported that the owner would not sell, and had given an option to some one in San Pedro. Thereupon plaintiff gave defendant a ten ride ticket for transportation to San Pedro and requested him to go there and find the holder of the option. Willmon went to San Pedro, and eventually found the holder of the option. He bought the lot for himself and some time later advised plaintiff that he had secured it in his own name and intended to keep it; and he thereafter refused to convey any interest therein to Koyer. Koyer testified that they would not have bought the first parcel if they had not found they could control the water front; that lot 14 was necessary for their purposes, and that they were buying the property for its water privileges, with the expectation of selling at a profit. The foregoing testimony was undenied, and it was upon same that the Supreme Court made its decision that the evidence was sufficient to sustain plaintiff's contentions and to support a conclusion that a partnership relation existed between the parties, and that it was therefore error to grant the nonsuit.

[1-3] The facts in that case are clearly distinguishable from those in the case before us. Here there had been no previous business transaction between plaintiff and Wolf and none was contemplated. The alleged purpose of buying the lot in controversy was not for a speculation or in contemplation of making a profit or carrying on a business between the parties. The most that can be said in plaintiff's behalf is that there was a mere oral agreement that defendant Wolf should purchase the lot and sell a half interest to plaintiff. And the finding of the trial court that no partnership between the parties existed or was created, is amply supported by the evidence. That a partnership is the association of two or more persons for the purpose of carrying on business together, and that their joint participation in the management and control of such business is an essential element of the partnership, and that the same element is necessary to constitute the parties joint adventurers, is held in Spier v. Lang, 4 Cal.2d 711, 716, 53 P.2d 138; Auditorium Co. v. Barsotti, 40 Cal.App. 592, 596, 181 P. 413; Martin v. Sharp, etc., Co., 34 Cal.App. 584, 588, 168 P. 373. Plaintiff did nothing upon his part, contributed nothing, risked nothing, and gave no consideration to support the contract. It follows that no confidential relationship growing out of any partnership relationship was created. The oral agreement, if we assume that the testimony shows that a contract was actually effected, was that defendant would purchase the lot and convey a half interest therein to plaintiff. Such contract is within the Statute of Frauds and unenforceable. It is said in 42 A.L.R. at page 63: "Ordinarily, oral agreements to join in the purchase of land do not give one party any enforceable right to claim the benefit of the purchase by the other. Viewed as agreements to transfer an interest in the land to be acquired, they are clearly within the Statute of Frauds; nor can they be given effect as a promise to hold for the benefit of another, save in those jurisdictions where express trusts need not be evidenced by writing. Except in those jurisdictions, therefore, the complainant cannot obtain relief unless he can establish a resulting trust, growing out of the use of his money in making the purchase, or a constructive trust, based upon the fraud of the defendant in procuring the title, or the abuse of some confidential relationship. The mere breach of the agreement that the complainant may share in the benefit of the purchase is not fraud in obtaining the title, and so will not give rise to a constructive trust."

Among cases which support this statement and in which the facts are comparable are: Dunphy v. Ryan, 116 U.S. 491, 497, 6 S.Ct. 486, 29 L.Ed. 703, 705; Schultz v. Waldons, 60 N.J.Eq. 71, 47 A. 187, 190; Abraham v. McSoud, 188 Okl. 409, 109 P.2d 822, 823; McDonald v. Conway, 254 Mass. 429, 150 N.E. 200; Mancuso v. Rosso, 81 Neb. 786, 116 N.W. 679; Norton v. Brink, 75 Neb. 566, 106 N.W. 668, 110 N.W. 669, 7 L.R.A.,N.S., 945, 121 Am.St. Rep. 822. Compare Silberman v. Angert, 100 N.J.Eq. 477, 138 A. 529, 530; Ewing v. Clore, 219 Ky. 329, 292 S.W. 824; Kelly v. Lehmann, 297 Ill. 33, 130 N.E. 375, 385; Meyer v. E. G. Spink Co., 76 Ind.App. 318, 124 N.E. 757, 127 N.E. 455, 457; Stamos v. Portland Elec. Power Co., 128 Or. 310, 274 P. 915; Gates Hotel Co. v. C. R. H. Davis Real Estate Co., 331 Mo. 94, 52 S.W.2d 1011, 1014, 1015.

California cases supporting the rule stated above are Roberts v. Ware, 40 Cal. 634, 636; Taylor v. Kelly, 103 Cal. 178, 37 P.

216; Neet v. Holmes, 25 Cal.2d 447, 464, 154 P. 854; Bauman v. Wuest, 32 Cal.App. 217, 219, 162 P. 434; Bradley v. Duty, 73 Cal.App.2d 522, 166 P.2d 914.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

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76 Cal.App.2d 511

PEOPLE v. POST et al.

Cr. 1973.

District Court of Appeal, Third District, California.

Oct. 16, 1946.

1. Larceny ⚷65

Evidence sustained conviction of grand theft accomplished by means of a confidence game, though defendants returned stolen money and travelers' checks when apprehended by uniformed police officer.

2. Larceny ⚷26

Where owner is induced by trick or device to part with his money or property without conveying title thereto and perpetrator of fraud thereby obtains possession with intention of appropriating property to his own use, it constitutes "larceny", though property is subsequently returned to owner.

See Words and Phrases, Permanent Edition, for all other definitions of "Larceny".

◆

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Herbert Post and Duke Bishop were convicted of grand theft, a new trial was denied, and they appeal.

Order and judgment affirmed.

Geo. E. Foote, of Sacramento, for appellants.

Robert W. Kenny, Atty. Gen., and James O. Reavis, Deputy Atty. Gen., of Sacramento, for respondent.

THOMPSON, Justice.

The defendants were jointly tried and convicted of grand theft of money and travelers cheques, accomplished by means of a confidence game. Neither defendant was a witness at the trial. A motion for new trial was denied.

The appellants contend that the verdicts and judgment are not supported by the evidence for the asserted reason that there is an absence of proof of an intention to steal the property since the money and cheques were subsequently returned to the owner.

Bert Schulte, the prosecuting witness, is a farmer who resided in Minnesota. He came to California to purchase a ranch. He arrived at Sacramento about noon on February 10, 1946, on a Greyhound bus, and sat down in the station by the side of the defendant Post. The defendants were total strangers to him. Post began to twirl a device consisting of a match and a safety pin, to attract his attention. Post engaged Schulte in conversation, eliciting the information that he had on his person $56 in cash and travelers cheques of the value of $300. The man who sat with Post soon left the waiting room. Post remarked that it was "stuffy" in that room, and suggested that they walk down L Street to see the Capitol. Schulte consented to do so and they left the station together. After they had walked a distance of about one-half block, Post stopped and was talking with Schulte when the codefendant, Bishop, approached and addressed them, saying, "Fellows, don't go out this way. I lost twenty dollars last night up there. A lady friend * * * took the $20.00 and beat it." To this remark Post replied, "You mustn't work it that way. You should match; take all or nothing." Bishop said, "I don't know how you mean,—'take all or nothing.'" Post explained, "Flip a coin." Bishop replied, "I don't know how to flip a coin." Then Post asked Schulte if he knew how to flip a coin, to which he replied that he had occasionally matched coins to determine who would pay for a cup of coffee. Post said, "We will show him how to match." Post produced a 50 cent coin which he held in his closed hand. Schulte said he thought they were merely showing

Bishop how to match coins. He did not think they were matching coins for a stake. If Bishop had a similar coin, Schulte did not see it. Post stood between them. But Post announced to Bishop, "You lost. * * * It will be $200." Schulte saw Post counting a roll of bills, but he did not see Bishop hand them to him. Post then said, "Yes, that is $200." Bishop then addressed Schulte, saying, "Now, you have to pay," to which Schulte replied, "I didn't match for any money." Bishop then said, "If I have to pay that man [Schulte] has to pay too." Post said to Schulte, "Why, you have some cash money? * * * Give it to me and I will give it to you back." Bishop said, "I want to see you pay too first and you [Post] can give it back to him." At the request of Post, Schulte gave him $56 in cash. Post then said, "You have Travelers Cheques," and the witness replied, "Yes I have six of them." At the further demand of Post, he signed the cheques and handed them to him. The witness testified, "He *made me sign* against the wall." Post put the money and cheques in his pocket and they started to walk back toward the Greyhound station. After they had proceeded a short distance, Bishop seized Schulte by the arm and finally grabbed him by the throat and detained him while Post attempted to escape by leaving them and crossing the street. At that juncture a police officer, who was in uniform, and who had been watching them, observed Post in a "very hurried walk across the street," 20 feet in front of him. The officer called to Post, who stopped and the officer accompanied him to the point where Bishop and Schulte stood, and asked them what was going on. Bishop told him "they had a drink and were just arguing a little bit." He then started to walk away, but was stopped by the officer. The three men were taken into the Diamond Club for investigation of the affair. The officer said, "We are going to search you boys now." He took them into a back room for that purpose, and began to ask them questions. In their presence the officer phoned the police station for a car to pick them up. Post then shoved the money and travelers cheques over to Schulte, who took them and put them in his side pocket. The officer observed that act and inquired, "What have you got there?" Schulte told him, and upon request handed the cheques to the officer. The men were soon taken to the police station where the officer examined them regarding the affair. Schulte told his story as previously related. The officer said to him, "Don't you ever wake up? They are taking you for a ride."

[1] The foregoing evidence furnishes ample proof of the intention of the defendants to steal the money and travelers cheques. The confidence game by means of which they secured the property from the prosecuting witness was simple and crude, but it was successful. In spite of the fact that Schulte was told that he would get his money and cheques back, and that they were subsequently returned to him after the defendants had been apprehended by a uniformed policeman and he had phoned for a machine to take them to the police station, the jury was warranted in finding that the defendants took the property with the intention of stealing it. The entire story indicates that fact. Schulte had pledged no money or cheques in the matching of coins. He was forced to sign the cheques before delivering them to Post. Bishop deliberately seized and detained Schulte to prevent him from following Post who hastily left them and crossed the street with the property in his possession. Fortunately the alert officer apprehended him and took him into custody. The money and cheques were not returned until the officer phoned in their presence for a car to take them to the police station.

[2] Asportation of the property with the intention to appropriate it is sufficient to constitute larceny even though the property may subsequently be returned to the owner. It is the sole province of the jury to determine from the evidence of the entire transaction the intention with which the property is secured. The fact that a thief is prevented by an officer from getting away with the property, or that he may change his mind and return the property to escape prosecution for the crime, does not relieve him from the consequences of the theft. People v. Quiel, 68 Cal.App. 2d 674, 157 P.2d 446; People v. Meyer,

75 Cal. 383, 17 P. 431; People v. Dukes, 16 Cal.App.2d 105, 60 P.2d 197; 15 Cal.Jur. 905, secs. 11 and 12; 144 A.L.R. 1385, note. Grand theft may be committed when the accused persons, with a preconceived design to obtain and appropriate property by means of fraud or trickery, thereby gain possession of the property, even though they do not retain or use it for their own benefit. People v. Gatlin, 75 Cal.App.2d 288, 170 P.2d 1013. When the owner is induced by trick or device to part with his money or property without conveying title thereto, and the perpetrator of the fraud thereby obtains possession with the intention of appropriating it to his own use, it constitutes larceny. People v. McCabe, 60 Cal.App.2d 492, 141 P.2d 54.

Clearly the defendants in this case procured the money and cheques from Schulte with the intention of stealing them. They were properly convicted of grand theft.

The judgment and the order are affirmed.

ADAMS, P. J., and PEEK, J., concur.

76 Cal.App.2d 389

EKLUND et al. v. EKLUND et al.

Civ. 13108.

District Court of Appeal, First District, Division 1, California.

Oct. 8, 1946.

1. Insurance 🔑590

Evidence that neither daughter nor mother and stepfather paying premiums on policies on daughter's life had intention or expectation of reimbursement of premiums warranted denial of lien in favor of mother and stepfather on policies for such premiums.

2. Work and labor 🔑7(1)

The inference that services rendered are to be paid for at their fair value exists where services are rendered by a stranger but not where services are rendered by a relative or member of the family circle.

3. Insurance 🔑585(6)

As between insured who did not request mother to pay premiums on life policies, and mother as a possible beneficiary but whose rights on maturity were subject either to insurer's choice of payee or insured's right to change beneficiary, mother had no right in policy which could be protected by payment of premiums.

4. Gifts 🔑28(3)

The retention of policies on daughter's life by mother and stepfather paying premiums was not of itself sufficient to show that there was no gift of policies to daughter.

5. Gifts 🔑23

Where a donor exercises custody and control over property as donee's agent, all other essentials of completed gift existing, the gift is thereby invalidated.

6. Insurance 🔑590

An action by mother and stepfather against daughter and husband and insurer to establish liens on daughter's life policies, the premiums for which had been paid by mother and stepfather, was not prematurely brought, notwithstanding that policies had not matured by lapse of time or death of daughter.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Dorothea G. Eklund and O. E. Eklund, her husband, against Maxine D. Eklund, also known as Maxine D. Hawke, and Charles E. Hawke, her husband, and another, to impress a lien for premiums advanced on life policies. From the judgment, the plaintiffs appeal.

Affirmed.

Hilary H. Crawford, of San Francisco, for appellants.

Henry F. Boyen and Frank J. Fontes, both of San Francisco, for respondents.

WARD, Justice.

This action to impress a lien for premiums advanced on a combination of five life insurance policies, was instituted by Dorothea G. Eklund, the mother of Maxine D. Hawke, who married Charles E. Hawke prior to the filing of the complaint. O. E. Eklund, the second named plaintiff, is the husband of Dorothea G. Eklund and the stepfather of Maxine.

The respective dates of issuance and the principals of the policies, as set forth by respondents, are as follows: (1) April 4, 1927, 20 year endowment $184; (2 and 3) January 12, 1931, two 20 year endowment, $450 each; (4) August 11, 1930, 20 year endowment $1,000, and (5) February 17, 1937, 10 year endowment $1,000. The last policy was issued when defendant Maxine was twenty-one years of age. Defendant Maxine Eklund is named in each policy as the insured. Policies 1, 2 and 3 are payable to the insured without a named beneficiary in case of her death, in which event a clause in the respective policies permits payment to be made to the executor or administrator of the insured's estate. The policies also provide that under specified circumstances "It is understood and agreed that the said Company may make any payment or grant any non-forfeiture provision provided for in this Policy to any relative by blood or connection by marriage of the Insured, or to any person appearing to said Company to be equitably entitled to the same by reason of having incurred expense on behalf of the Insured, for his or her burial." In policies 4 and 5, "in case of the prior death of the Insured," the mother of the insured is named as the beneficiary. In the last two policies "The right to change the Beneficiary has * * * been reserved" by the insured.

Plaintiffs, the mother and stepfather, paid all of the premiums out of their community funds to the Prudential Insurance Company of America. The trial court found "that all of the premiums on the aforesaid policies were paid by the said Dorothea G. Eklund voluntarily and without expectation of reimbursement and solely because of the love and affection of the plaintiffs for the defendant, Maxine D. Hawke, who is the natural child of the plaintiff, Dorothea G. Eklund, and who was treated in all respects by the plaintiff, O. E. Eklund, as his natural child during all of the times herein mentioned." The main question involved is the intention of the parties.

[1] "If services are rendered or goods delivered without any intention or expectation of payment, there can be no recovery therefor." 17 C.J.S., Contracts, § 46, p. 388.

The mother testified:

"I didn't expect to get any insurance from my daughter. I didn't take them out for that idea. * * * My daughter and I were very close for a good many years."

The record further shows:

"A. Well, I don't think there would have ever been any question about it between us at all if her husband had not got the idea that she was signing away something that belonged to him.

"Q. In other words, if her husband had not interfered with the arrangement, and your daughter had continued to live at home, or married somebody of your choice, you would have continued paying the premiums, would you not? A. Well, I paid them, anyway.

"Q. That is what you have done? A. Yes, but I don't think there would have been any friction about it."

Speaking of the policies, the daughter, referring to her mother, testified: "Oh, yes, she always said they would be a fine little nest egg for me some day to do with as I would like to do, they would come in very handy, maybe, when I would really need them."

This evidence was sufficient for the trial court to conclude that there was no intention or expectation on either side that reimbursement should be made by the daughter to the mother of the premiums paid. The Supreme Court in Crane v. Derrick, 157 Cal. 667, 672, 109 P. 31, 33, said: "Our own decisions appear to support the doctrine that to authorize compensation in such cases the circumstances must be such as to warrant the inference that it was the expectation of both parties that compensation should be made. Murdock v. Murdock, 7 Cal. 511, 513; Friermuth v. Friermuth, 46 Cal. 42. And it is emphatically declared in Murdock v. Murdock, supra, that it is the expectations of the parties existing while the relation continued that is to control, and that no circumstances occurring afterwards can convert that into an implied contract, that was not so before."

[2] In addition to the testimony of the mother and the daughter—that reimbursement was never contemplated—the trial court had the right to consider that where services are rendered by a near relative or member of a family without an agreement thereon an inference that payment or compensation is to be made is not usually drawn. As between persons not related it is usually implied that services rendered by one to another are to be paid for at their fair value, but "This inference is not usually drawn, however, where services are rendered another by a near relative or member of the family circle. Even though there is no blood relation between the parties, if the services are rendered by one who has been adopted as a member of the household, there will also ordinarily be no inference of a promise to pay." Williston on Contracts, Revised Edition, Vol. 1, § 91A, pp. 282, 283. In Ruble v. Richardson, 188 Cal. 150, 157, 204 P. 572, 575, quoting from 1 Beach on Contracts, sec. 653, pp. 788, 789, the court said: " 'Ordinarily, where services are rendered and voluntarily accepted, the law will imply a promise upon the part of the recipient to pay for them; but where services are rendered by members of a family, living in one household, to each other, or necessaries are supplied by one near relation to another, the law will presume that they were gratuitous favors merely, prompted by friendship, kindness and the relationship between them.' " "Where one person renders services for another, or supports another, the relationship of the parties is of great weight in determining their intention for the purpose of saying whether a contract to pay is to be implied. The question in all cases is one of intention, but relationship or membership in the family may rebut the ordinary presumption of contractual intention." 17 C.J.S., Contracts, § 46, p. 388; 28 R.C.L. §§ 15, 16, pp. 680–682. The rule was recognized and approved in Ferguson v. Dam, 140 Cal.App. 701, 705, 35 P.2d 1072, 1073, as follows: "The jury awarded respondent the full amount of the note, thereby impliedly finding against appellant upon the issue of the existence of the alleged agreement and further impliedly finding that said services were rendered by appellant for his mother gratuitously." See, also, Schaad v. Hazelton, 72 Cal.App.2d 860, 165 P.2d 517; Newbert v. McCarthy, 190 Cal. 723, 214 P. 442.

[3] It is the contention of the appellants that a beneficiary who has advanced premiums for the purpose of keeping a life insurance policy alive, is entitled to an equitable lien. To support this principle they cite Pomeroy's Equity Jurisprudence, Vol. 3, Fourth Ed., § 1243; 14 Cal.Jur., p. 539, § 91; Stockwell v. Mutual Benefit Life Insurance Co., 140 Cal. 198, 73 P. 833, 98 Am.St.Rep. 25; Morgan v. Mutual etc., Ins. Co., 16 Cal.App. 85, 116 P. 385, 389. The quotations from Pomeroy and California Jurisprudence do not touch upon the intention or expectation of payment by near relative in a family to another. To the cases cited in Pomeroy, California Jurisprudence, etc., there may be added Nulsen v. Herndon, 176 La. 1097, 147 So. 359, 88 A.L.R. 239, which involves premium payments made where a reasonable inference at least may be drawn of an expectation of reimbursement. As previously stated appellants rely on Stockwell v. Mutual Life Ins. Co., supra, which held that payment of premiums by one beneficiary which kept a policy of life insurance alive for the benefit of several beneficiaries, which policy otherwise would have lapsed, should be reimbursed to the paying beneficiary out of the proceeds of the policy; and on Morgan v. Mutual, etc., Ins. Co., supra, in which the court held that payment of premiums made under a void assignment of a policy gave the payor a right to the proceeds of the policy as against the named beneficiaries when the payments exceeded the amount of the proceeds. In both cases it is to be noted that the payor of the premiums was not a mere volunteer: in the first he had an interest to protect which he could not protect without paying for the other beneficiaries; in the second, at the request of the insured and his then beneficiary, and with a supposedly valid assignment, the payor kept alive for them the policy which would otherwise have elapsed. It can not be

said that either case lends support to appellants' position, where the contest is between the insured, who did not request the payment of the premiums, and the possible beneficiary, the rights of any of whom upon maturity were subject either to the insurance company's choice of payee or the insured's right to change the beneficiary. The plaintiffs had no right which they could protect by the payment of the premiums. The position of the appellants in this respect is not based on solid legal grounds.

[4, 5] The closing brief stresses the contention that there was no gift because there was no delivery of the policies. The retention by appellants of the policies is a neutral factor which does not, standing alone, assist either party without evidence concerning the intent of such retention. Ordinarily where a donor exercises custody and control over property, an implied agency arises from the relationship, as appears in this case—"all other essentials of a completed gift existing, the gift is not thereby affected or invalidated." Lynch v. Lynch, 124 Cal.App. 454, 461, 12 P.2d 741.

[6] Other points are raised by respondents which in view of the conclusion reached on appellants' main contention need not be considered, except the plea of the statute of limitations. Code Civ.Proc. § 339, subd. 1, § 343. In support of this contention respondents set forth in their brief: "It will be observed that there can be no cause of action on account of payment of premiums until the death of the insured. The insured in this case is the respondent, Maxine D. Hawke, a party to this proceedings, and admittedly none of the policies have matured by the lapse of time, or the death of the insured." In the Stockwell case, supra, it is said (140 Cal. at page 201, 73 P. at page 834, 98 Am.St.Rep. 25): "It is quite true that there was no legal liability resting upon any of the beneficiaries to pay the premiums accruing upon the policy, and that the payments made by respondent were, in that sense, voluntary. But it was not in the power of respondent to sever her interest in the policy from that of the other children of the assured, and keep alive the policy for her own benefit by paying one-fifth of the premiums as they became due. She was compelled to pay the entire premium as it accrued, or forfeit all interest under it." There is no merit in respondents' position that the action was prematurely brought. The holding in the Stockwell case, supra, would have no application to a suit between an insured and his beneficiary where the beneficiary was claiming an interest adverse to the insured, in the event he had such an interest. The best way to protect any lien which the plaintiffs have in this case, where they have knowledge that the insured is claiming adversely to them, is to bring suit prior to a change in beneficiaries, maturity, or a cashing in of the policies prior to maturity. The suit is in the nature of an action for declaratory relief and the trial court so treated it.

The testimony heretofore referred to, corroborated by the circumstances surrounding the various insurance transactions, plus the reasonable inference drawn from the relationship of the parties, warranted the trial judge in entering the judgment "that Maxine D. Hawke is the owner of and entitled to the immediate possession of all of the policies hereinafter described, free from any lien or claim of plaintiffs, or either of them, and her title to said policies is hereby established and quieted and said plaintiffs are hereby forever debarred from asserting any claim against said policies and it is hereby further Ordered, Adjudged And Decreed that said Maxine D. Hawke has the right to change the beneficiary in each of said policies." The record shows that the policies were not intended as life insurance policies for the benefit of the mother.

The judgment is affirmed.

PETERS, P. J., and SCHOTTKY, Justice pro tem, concur.

76 Cal.App.2d 430

PEOPLE v. WADE et al.

Cr. 4016.

District Court of Appeal, Second District, Division 2, California.

Oct. 9, 1946.

Hearing Denied Nov. 4, 1946.

1. **Criminal law** 🔑1144(13)

On appeal from conviction the evidence will be viewed most favorably to the people.

2. **Burglary** 🔑42(3)

The possession of stolen property, coupled with false statements about how the property came into defendant's possession, is sufficient evidence to sustain a conviction of burglary.

3. **Burglary** 🔑42(3)

Evidence that after burglary defendant was in possession of check stolen at time of burglary, that defendant gave inconsistent and conflicting accounts of how the check came into his possession and that defendant was in possession of the instrument with which window bars were cut at time of burglary sustained conviction of burglary in the second degree.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

John D. Wade and Frank Marquez Gordillo were convicted of burglary in the second degree, and from such conviction and from order denying motion for a new trial, the last-named defendant appeals.

Affirmed.

Abbott Bernay, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., Fred N. Howser, Dist. Atty., and Robert Wheeler, Deputy Dist. Atty., all of Los Angeles, for respondent.

McCOMB, Justice.

Defendants were convicted after trial before a jury of burglary in the second degree. This appeal is from the judgment of conviction of defendant Gordillo and from the order denying his motion for a new trial.

[1] Viewing the evidence most favorable to respondent (People), the facts are:

On April 20, 1945, the Track Cafe located in Pasadena, California, was burglarized. Admission to the cafe was obtained by the cutting of five-eighths inch thick bars on a rear window of the establishment. Property of a value in excess of $1,000 was taken. Included in the articles stolen was a check in the sum of $50.00 which defendant Gordillo subsequently cashed. After his arrest said defendant stated that he had received the check in a crap game. Later he stated that he did not get the check in a game; that he knew from whom he received it, but that he could not afford to tell. At the time that defendants were arrested there was found in their car a set of bolt cutters which it is conceded were used in the commission of the burglary.

On May 28, 1946, defendant Wade filed an opening brief in support of his appeal with this court. On July 10, 1946, defendant Gordillo filed a document whereby he adopted in his own behalf by reference the brief filed by his co-defendant. On July 12, 1946, defendant Wade abandoned his appeal and requested that a remittitur issue immediately. An order pursuant to such request was made by this court July 15, 1946.

The only point urged as a reason for reversing the judgment in defendant Wade's brief which is applicable to his co-defendant is the proposition that *there is not any substantial evidence to sustain the judgment finding defendant guilty of burglary in the second degree.*

[2] This proposition is untenable. The law is established in California that possession of stolen property coupled with false statements as to the manner in which the property came into defendant's possession is sufficient evidence to sustain a conviction of burglary. (People v. McCann, 34 Cal.App.2d 376, 377, 93 P.2d 643.)

[3] Applying the foregoing rule of law to the facts in the instant case there is substantial evidence to sustain defendant's conviction of burglary since he possessed

the check stolen at the time of the burglary and gave inconsistent and conflicting accounts of the manner in which it came into his possession. Also defendant was in possession of the instrument with which the window bars at the Track Cafe were cut.

For the foregoing reasons the judgment and order appealed from are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.

76 Cal.App.2d 310

OAKLEY et al. v. ROSEN.

Civ. 15374.

District Court of Appeal, Second District, Division 2, California.

Oct. 2, 1946.

1. Trial 🔑404(2)

The trial court's finding that contract for sale of interests in profits from dramatic production contract was for prosecution of joint adventure, not a stock certificate, bond or other type of security referred to in Corporate Securities Act, requiring permits to sell securities, was a fact finding, not a conclusion of law, in action to recover amounts paid for such interests. Gen. Laws, Act 3814, § 3.

2. Judgment 🔑256(1)

A judgment, to be valid, must be supported by fact findings.

3. Appeal and error 🔑544(3)

A judgment, appealed from on judgment roll alone, cannot be reversed except for fatal error on face of judgment.

4. Appeal and error 🔑544(2)

On appeal on judgment roll, alone, only question presented is whether trial court's fact findings support judgment appealed from.

5. Appeal and error 🔑907(3)

On appeal on judgment roll alone, trial court's fact findings must be given construction which will uphold rather than defeat judgment.

6. Joint adventures 🔑5(1)
Licenses 🔑39

In action to recover amounts paid for interests in profits from defendant's dramatic production contract with authors of play, findings supported trial court's conclusion that instrument signed by investors was for prosecution of joint venture, not a security within Corporate Securities Act requiring permits to sell securities. Gen. Law, Act 3814, § 3.

7. Joint adventures 🔑1
Licenses 🔑18½

A contract to supply portion of funds for production of play under contract between recipient and author in consideration of pro rata share of profits from enterprise was "joint adventure", not a "security" within Corporate Securities Act requiring permits to sell securities, though recipient was to produce play without assistance of investors furnishing funds. Gen.Laws, Act 3814, § 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Adventure" and "Security".

8. Licenses 🔑18½

A joint adventure contract, providing for maintenance of adventurers' offices in New York City, to which investors transmitted their moneys for deposit, and signed by last subscriber in New York, where he paid his money, was a New York contract, to which California Corporate Securities Act, requiring permits to sell securities, was inapplicable, though some investors signed contract in California. Gen.Laws, Act 3814, § 3.

9. Statutes 🔑239, 241(1)

To make criminal by statute an act not forbidden by common law, legislative language must be strictly construed.

10. Licenses 🔑18½

An agreement, designated therein and treated by parties as one for joint adventure and not listed as a security in Corporate Securities Act nor never construed as such, cannot be regarded as a security within such act, and hence is not void because of failure of party conducting enterprise to obtain permit to sell securities. Gen. Laws, Act 3814, § 3.

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Florence Oakley and another against Al Rosen for amounts paid by plaintiffs for interests in defendant's profits from a dramatic production contract. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Walley & Davis, of Los Angeles, for appellants.

Harold A. Fendler and Bertin A. Weyl, both of Los Angeles, for respondent.

MOORE, Presiding Justice.

In a joint complaint appellants sued appellee for the sums of $2,400 and $1,200 alleged to be amounts paid by them respectively for ten per cent and five per cent interest in the profits to be realized by appellee from a dramatic production contract with the authors dated September 24, 1942. By such contract appellee had undertaken to produce and present a play entitled "Harem Scarem." It is also alleged that one Ben Blumenthal and one Israel Slavin were investors to the extent of five per cent and thirty per cent respectively in the "Harem Scarem" contract, and that both signed the same agreement with appellants and appellee. Appellants base their right of recovery upon the claim that appellee sold such interests without first having obtained from the commissioner of corporations a permit so to do, as required by section 3 of the Corporate Securities Act. Deering's General Laws, Act 3814. They alleged that they were unaware of appellee's failure to comply with the law; that they relied upon the validity of the contract; and that the instrument is void in that it was made with the intention of evading the provisions of the last-mentioned statute.

The court determined practically all of the substantial allegations of appellants to be untrue; that the agreement signed by appellants was for the prosecution of a joint venture; that no securities were ever negotiated, sold, offered for sale or issued by appellee to either appellant; that while no permit was ever issued to or applied for by appellee, none of the investors believed a permit to be necessary and none of them intended to violate the Corporate Securities Act, but that all believed the agreement with appellee to be valid. From the judgment denying to appellants relief they have lodged this appeal on the judgment roll.

[1-5] They contend now that the court's finding that the transaction constituted a joint venture is meaningless for the reason "that it is not a finding of fact but a conclusion of law"; that the "trial court could only conclude, as a matter of law, that from the facts found the transaction in question constituted a joint adventure."

No inhibition exists against a court's finding that an agreement was for the prosecution of a joint adventure. It was so found in Tiffany v. Short, 22 Cal.2d 531, 139 P.2d 939, and in Hansen v. Burford, 212 Cal. 100, 297 P. 908, and no adverse comment followed. In the latter case it was held that the finding of a joint adventure was one of probative fact. While it may be a legal conclusion thus to differentiate such an agreement from a contract for a copartnership or a corporate organization, yet it becomes a finding of fact when it distinguishes a contract for a joint venture from a certificate of stock, a bond or other type of security referred to in the Corporate Securities Act. While the law requires a valid judgment to be supported by findings of fact (Berg v. Berg, 56 Cal. App.2d 495, 132 P.2d 871), it is equally well settled that when an appeal is based upon the judgment roll alone a reversal cannot be ordered except for a fatal error on the face of the judgment (Keim v. Roether, 32 Cal.App.2d 70, 80 P.2d 187); that on such an appeal the only question presented is whether the findings support the judgment (Derrer v. Keeler Gold Mines, Inc., 63 Cal.App.2d 606, 147 P.2d 102), and that the findings must be given such construction as will uphold rather than defeat the judgment. Id.

[6, 7] Not only did the court herein make a direct finding that the instrument signed by the investors was for the prosecution of a joint venture, but it found also that in August 1942 Florence Oakley notified appellee in New York City that she desired to participate with him "in the joint venture of financing and producing said play"; that during the month of September, 1942, appellee "caused to be prepared, in the City of New York the agreement of joint venture" which was executed in New York by Ben Blumenthal and appellee about the 26th day of September, 1942; that it was subsequently signed by Florence Oakley in California October 10, 1942, at which time she transmitted $2,400 to Rosen which he "forthwith transmitted to * * * New York for deposit * * * in the bank account maintained by said joint venture * * * in * * * New York"; that a counterpart of the agreement was signed by G. C. Oakley in Los Angeles, October 16, 1942, when he forwarded his $1,200 to appellee in New York, which sum was also deposited in the bank account of the joint venture. In their separate notices of rescission both plaintiffs referred to the enterprise in which they had invested as "a joint venture for the producing of a play, entitled Harem Scarem."

Such findings and the reasonable inferences therefrom in the absence of the reporter's transcript furnish generous support for the conclusion that the instrument signed was for the conduct of a joint adventure. Goldberg v. List, 11 Cal.2d 389, 79 P.2d 1087, 116 A.L.R. 900. The agreement contains no distinct markings that should deny its classification as an agreement for a joint adventure. On the contrary it possesses every element requisite to such an agreement. 30 Am.Jur. p. 677, § 3. Rosen had acquired by contract the right to exploit a play. He was in need of finances with which to proceed with his plans. Appellants supplied a portion of the funds on the conventional basis of taking their pro rata shares of the profits to be earned from the specific enterprise which was to be conducted by appellee as the producer. Because it does not differ in its essentials from joint ventures for mining, building, promotion and other undertakings, it can be nothing but an agreement for a joint adventure. Tiffany v. Short, supra; Hansen v. Buford, supra. The fact that appellee was to produce the play without the assistance of appellants makes it nonetheless a joint venture. Many successful enterprises owe their pronounced achievements to the program and direction of a single mind.

[8] Certain incontestable facts determined the forum of the agreement. By its terms the instrument provides that the joint venture shall maintain its offices in New York City and the Oakleys transmitted their moneys to that metropolis for deposit. Although appellants signed the document in California in October, Mr. Slavin, the last subscriber, did not affix his signature thereto until November. Since it provided that the funds invested would not be used until $12,000 had been subscribed, the agreement was not complete until Slavin had signed it and paid his money in New York. Such acts being the last steps essential to its completion it was a New York contract (Gas Appliance Sales Co., v. W. B. Bastian Mfg. Co., 87 Cal.App. 301, 306, 262 P. 452; Fitzhugh v. University Realty Co., 46 Cal.App. 198, 199, 188 P. 1023), and for that additional reason the California Corporate Securities Act could have had no application to it even though some of its signers had become signatories in California. Robbins v. Pacific Eastern Corporation, 8 Cal.2d 241, 65 P.2d 42.

[9, 10] But without regard to the place of its origin the agreement cannot reasonably be construed as a security within the meaning of the Corporate Securities Act. Making criminal by statute an act which had not been forbidden by the common law requires that the legislative language be strictly construed. Cook v. Superior Court, 12 Cal.App.2d 608, 611, 55 P.2d 1227. As thus construed it cannot be said that an agreement which designated itself to be one for a joint venture and which the parties treated as such is a security within the contemplation of the Act. The court determined that it was a joint venture and that no security was ever sold or offered for sale by appellee to appellants. The facts

that no such instrument as the agreement in question was listed as a security in the Corporate Securities Act and that it has never been construed as a security justifies the inference that the legislature had no intention that it should be so regarded. First National Bank v. Kinslow, 8 Cal.2d 339, 346, 65 P.2d 796.

It has been held that an agreement whereby ten men each invested $500 in a joint venture to purchase an oil lease was not a security (Lindemulder v. Shoup, 258 Mich. 679, 242 N.W. 807); that an agreement of fourteen men to purchase 240 acres for a speculation, one man acting as trustee and title holder for the group, was not within the contemplation of the Blue Sky Law (Polk v. Chandler, 276 Mich. 527, 268 N.W. 732); and that an agreement of a group of persons to purchase an oil lease could not "be construed in such manner as to prohibit persons from associating for the purchase of lands or interests therein as partners or otherwise," as contemplated by the Blue Sky Law. Hanneman v. Gratz, 170 Minn. 38, 211 N.W. 961, 963. While a contract for a joint adventure might be used as a subterfuge whereby to evade the requirements of the Corporate Securities Act, yet such attempted evasion must be found as a fact before the author of the scheme may be subjected to the penalties that flow from such violation. There was no such finding in the case at bar but on the contrary all the findings and every intendment to be given them belie the contention that the agreement was not intended to be and in fact was not a security but was a valid contract and in no respect subject to the supervision of the Corporation Commissioner. See People v. Davenport, 13 Cal.2d 681, 91 P.2d 892.

The authorities cited by appellants are readily distinguishable. The facts of such cases disclose either that the violator had transgressed the letter of the statute (Domestic & Foreign Petroleum Co. v. Long, 4 Cal.2d 547, 51 P.2d 73; People v. Oliver, 102 Cal.App. 29, 282 P. 813; People v. McCabe, 60 Cal.App.2d 492, 141 P.2d 54; Pickford Co. v. Bayly, 12 Cal.2d 501, 86 P.2d 102; Boss v. Silent Drama Syndicate, 82 Cal.App. 109, 255 P. 225), or the trial court found that the device or scheme used was a disguised attempt to evade the statute. Moore v. Stella, 52 Cal.App.2d 766, 127 P.2d 300; Auslen v. Thompson, 38 Cal.App.2d 204, 101 P.2d 136; Gillis v. Pan American Western Petroleum Co., 3 Cal.2d 249, 44 P.2d 311.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

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76 Cal.App.2d 399

CAMPBELL v. BOARD OF CIVIL SERVICE COM'RS OF CITY OF LOS ANGELES et al.

REININK v. SAME.

Civ. 15522, 15523.

District Court of Appeal, Second District, Division 3, California.
Oct. 8, 1946.

As Modified Oct. 14, 1946.

Hearing Denied Dec. 5, 1946.

1. Municipal corporations 🔑133

The methods prescribed by city charter for making of appointments in civil service are mandatory.

2. Municipal corporations 🔑184(3)

A war emergency appointee to city police force did not acquire a permanent status in classified civil service on theory that ordinance insofar as it gave continuing temporary status to his employment conflicted with charter which limited period of temporary employment to 60 days where, under charter, temporary employments were only temporary expedients preliminary to positions being filled through established procedure, and, if ordinance was invalid, his status would have terminated 60 days after it was made.

Appeals from Superior Court, Los Angeles County; Henry H. Willis, Judge.

Actions by David H. Campbell, etc., and by Harry Reinink, etc., against the Board of Civil Service Commissioners of the City of Los Angeles and others for declaratory relief to establish plaintiffs' status as permanent civil service employees. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Arthur R. Hemm, and C. M. Kilpatrick, both of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and George William Adams, Deputy City Atty., all of Los Angeles, for respondents.

SHINN, Justice.

We have before us consolidated appeals by the respective plaintiffs in two actions which they brought against the Board of Civil Service Commissioners of the City of Los Angeles, and others, in which they sought declaratory relief.

In one action David H. Campbell sued for himself, and on behalf of others similarly situated, to establish their status as permanent civil service employees under action theretofore taken appointing them policemen of the City of Los Angeles and declaring that the defendants have no right to discharge them except for cause, under Article IX of the City Charter. The judgment in the Campbell case declared: "That plaintiff, and each of said others, are war emergency policemen, under and by virtue of the provisions of Ordinance No. 88,110 of the City of Los Angeles, and that plaintiff's employment, and the employment of all others similarly situated, may be terminated at any time by the head of the Police Department or by the Board of Civil Service Commissioners of the City of Los Angeles."

Plaintiff was appointed November 16, 1943, and continuously thereafter has been employed by the city as a war emergency policeman, and the others in whose behalf the action was brought have been and are serving under like appointments.

The question whether the appointments of the parties plaintiff, which were only temporary at the time they were made, have become regular or permanent, by reason of the continued service of plaintiffs as emergency policemen, requires a consideration of the charter provisions and ordinances relating to temporary appointments, and also the charter provisions which set forth the procedure for regular or permanent appointment in the classified civil service.

Section 109, Article IX of the Charter provides for temporary appointments in the classified civil service as follows: "* * * To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department, or any officer or board, may under such regulations as the board may by its rules prescribe, make temporary appointments in the classified civil service, to remain in force not exceeding sixty days and only until regular appointments, under the provisions of this article, can be made."

The general procedure for entering the civil service through legal channels is set out in sections 100 et seq. of the Charter, and section 100 provides that no appointment shall be made except under and according to the prescribed procedure. That provides for public competitive examinations, open to all citizens of the United States, which examinations shall be under the control of the Board of Civil Service Commissioners; that applicants having a general average standing in the examinations, for each class, not less than the minimum fixed by rules of the board, take rank as candidates for appointment in the order of their determined relative excellence; that successful candidates are placed upon the register of eligibles and upon notification of the board by the head of a department are certified to the number of not less than three who stand highest on the register; that the position for which they are qualified must be filled from the names so certified; that the candidate thus appointed is thereby employed on probation for a period fixed by the rules of the board, not exceeding six months; that at or before the expiration of the period of probation, the head of the department or office in which the candidate is employed may discharge him upon assigning in writing the reasons therefor to said board, and that if he is not thus discharged during the period of probation, his appointment shall be deemed complete.

In November, 1942, the City Council adopted Ordinance No. 87,140, making provision for temporary appointments in the city service in the emergency caused by the war. It recited that there existed in the city government a local emergency, due to enlistment of city employees in the armed forces and their employment in war industries, that the man power shortage rendered it difficult and at times impossible to secure sufficient employees through civil service channels, and that the functioning of the city government was thereby vitally affected. It recited that it was frequently impossible to establish regular eligible lists within 60 days after temporary appointments were made, and it provided that whenever at the expiration of 60 days after the head of a department had filled a vacant position in the classified service by temporary appointment, there was no appropriate civil service list from which certification could be made, and the position could not be filled in any other manner provided by the charter or the rules of the Civil Service Commission, the head of the department might continue such temporary appointment in effect longer than 60 days, but only until a regular appointment could be made under the provisions of Article IX of the Charter. The ordinance also provided that the board might at any time withdraw its approval and terminate any temporary appointment after it had been in effect for more than 60 days, and might apply the provisions of the ordinance retroactively to cases where the 60-day period of employment had expired prior to the effective date of the ordinance. Section 6 read: "This ordinance shall continue in force and effect for the duration of the war and six months thereafter unless sooner repealed." It was declared to be and was passed as an emergency ordinance to take effect at once.

Ordinance No. 87,140 was repealed by Ordinance No. 88,110, adopted January 4, 1944, which covered the same ground, but more fully. Sections 2, 3 and 6 provided as follows:

"Sec. 2. Whenever, because of the war emergency, there is no appropriate civil service list from which certification for employment in any position in the classified civil service can be made under the provisions of Article IX of the city charter, and the position cannot be filled by regular civil service appointment, the head of a department may make a 'War Emergency Appointment' subject to approval by the Board of Civil Service Commissioners, to remain in force only until a regular civil service appointment can be made but not exceeding six months after the date on which existing hostilities shall have ceased between the United States and the nations of Germany, Italy and Japan as fixed by proclamation of the President of the United States or resolution of the Congress. Any employment authorized under the provisions of this ordinance is subject to termination at any time by the head of the department or by the Board of Civil Service Commissioners.

"Sec. 3. All persons employed pursuant to this ordinance, shall be known as 'War Emergency Employees' and shall be so designated on all records or documents relating to their employment or compensation. No such person shall acquire any civil service or other permanent status because of such employment."

"Sec. 6. Ordinance No. 87,140, approved November 6, 1942, relating to temporary employment of personnel, is hereby repealed; provided, however, that any appointment heretofore made pursuant to the provisions of Sec. 109 of the charter and thereafter duly extended or continued in effect longer than a period of sixty (60) days by order and approval of the Board of Civil Service Commissioners pursuant to said Ordinance No. 87,140, shall be valid as a 'War Emergency Appointment' and continued in effect subject to the provisions of this ordinance."

Plaintiff's temporary appointment, being one authorized by the charter and by Ordinance No. 87,140 and having been extended and continued in effect longer than the original 60 days by order and approval of the Board of Civil Service Commissioners, was and is a valid "war emergency appointment" under the provisions of Ordinance No. 88,110. While plaintiff alleged in his complaint that he is a war emergency policeman, he also alleged that he was appointed in the manner provided by section 100 of the Charter for the appointment of candidates in the civil service; that by virtue of his appointment he became a probationary employee, that he served the period of probation of six months and was not discharged, and he contends that he thereby automatically became a permanent employee in the department under the provisions of said section 109. The procedure that was followed in the making of the so-called war emergency appointments was the following:

Plaintiff and other applicants were interviewed by the Police Department, and those who were passed preliminarily upon interview were given a perfunctory mental test and, if they passed that, a medical examination, surviving which, they were directed to appear for the next two weeks' course of instruction at the police academy. The Police Department provided, for the mental test, what was known as the "Otis Quick Scoring Mental Ability Test," under which the applicant was given 80 questions to answer; 32 correct answers would give him a passing I. Q. of 90, out of a possible 138. The two weeks' course at the police academy was arranged and supervised by the Police Department and dealt with the basic rules and regulations of the Department and the duties of its members. On November 16, 1943, plaintiff was sworn in as a police officer and his pay commenced. This was on the first day of his instruction at the police academy. At that time he received a circular from the Police Department, stating that his appointment would be temporary, that it was improbable that anyone over 30 who received a war emergency appointment as a policeman would be eligible to take the next civil service examination and that the appointment on a temporary basis would not assure him of permanent appointment under civil service nor the possibility of being blanketed into the service. Plaintiff signed a statement to the effect that he had read the information sheet, understood that the Board of Police Commissioners might terminate his employment at any time and that, upon the establishment of a civil service eligibility list, authority for his continued employment would cease and terminate.

It appeared from the evidence that plaintiff took no examination in which he competed against other applicants, was given no ranking in accordance with his determined excellence, and was not placed upon an eligible list or certified for appointment in accordance with the procedure outlined in section 100 of the Charter. The tests and the instruction which he took were not intended to be a substitute for those which pertained to the regular civil service procedure. His examination was not competitive except in the sense that he was endeavoring to and did receive a passing I. Q. rating of 90 out of a possible 138. His appointment depended only upon his passing the medical examination and receiving a passing grade in the mental ability test.

[1, 2] The methods prescribed by charter for the making of appointments in the civil service are mandatory and controlling. Campbell v. City of Los Angeles, 47 Cal.App.2d 310, 313, 117 P.2d 901; Heard v. Board of Administration, etc., of the City of Los Angeles, 39 Cal.App.2d 685, 695, 698, 104 P.2d 47; Pinion v. State Personnel Board, 29 Cal.App.2d 314, 317, 319, 84 P.2d 185; Nash v. City of Los Angeles, 78 Cal.App. 516, 519, 520, 248 P. 689. No power reposed in the City Council, the Board of Civil Service Commissioners or the Police Department to adopt methods of appointment different from those prescribed by the Charter, nor could the essentials of the Charter requirements have been dispensed with by ordinance. But there was no attempt to dispense with them. It was the inability to fill positions through the regular civil service channels which brought about the scheme of war emergency appointments. Plaintiff accepted such an appointment well understanding that it was temporary, only, and that his continued service would not result in his appointment becoming permanent. But he contends that it was not within the power of the City Council to thus continue his temporary employment, for the reason that it was limited by the charter to 60 days. We understand his argument to be that the ordinance, insofar as it gave a fixed and continuing tem-

porary status to his employment, was in conflict with the charter and void, and that when the period of 60 days, as limited by the charter, had expired he became a probationary employee and, at the expiration of six months of service, a permanent employee, subject to discharge only for cause. We are unable to agree with this contention. In the first place, while the charter provides for the making of temporary appointments to positions within the classified civil service, such appointments are in reality only temporary expedients preliminary to the positions being filled through the established procedure. The appointments do not make the appointees qualified civil service employees or members of the civil service system, which can be entered only through successful competitive examination, certification and appointment. The ordinances only relieved the board and the head of the Police Department from making successive appointments of 60 days each until examinations could be held and eligible lists created in accordance with the civil service provisions of the charter. We find no conflict between the ordinances and those provisions, but as we consider plaintiff's argument we cannot see how it leads to the conclusion that invalidity of the ordinance would bring about a change in the temporary character of his employment. Had it not been for the continuation, under the ordinance, of his employment beyond the original 60-day period, his status as an employee, instead of being a permanent one, would have been without a legal basis and would have terminated 60 days after it was made.

We find no support for the claim that plaintiff has been appointed or has acquired a status in the classified civil service other than as a temporary employee whose appointment may be terminated at any time.

The second action was instituted by Harry Reinink on behalf of himself and others similarly situated. His situation differs from that of Mr. Campbell only in the respect that he was appointed subsequent to January 5, 1944, when Ordinance No. 88,110 was adopted. The methods followed in determining his qualifications were substantially the same as those in the Campbell case and he received a similar course of training. He, also, contends that his appointment became permanent because he performed the duties of a policeman for more than six months and had not been discharged therefrom at the time of trial. The conclusions of the court were the same as in the Campbell case; Mr. Reinink and those on whose behalf he sued were declared to be subject to discharge at any time by the Board of Civil Service Commissioners or the head of the Police Department. Civil service examinations have only recently been held and an eligible list has been established, but the parties plaintiff are claiming no rights thereunder.

We are in full accord with the conclusion of the trial court, and the judgments in the two cases should be and are affirmed.

DESMOND, P. J., and KINCAID, Justice pro tem., concur.

76 Cal.App.2d 395

PERRY v. DABNEY et al.

Civ. 15183.

District Court of Appeal, Second District, Division 3, California.

Oct. 8, 1946.

Army and navy 🔑34

Plaintiff who failed to have judgment entered within three years after service of summons could not invoke provision of Soldiers' and Sailors' Civil Relief Act relating to protection of persons secondarily liable, so as to prevent dismissal of his action under statute, because plaintiff's attorney who entered military service would allegedly be subject to action for malpractice, effect of which would be to make attorney secondarily liable, since whatever action plaintiff might have against his attorney would be based upon a different cause. Code Civ.Proc. § 581a; Soldiers' and Sailors' Civil Relief Act of 1940, § 103, 50 U.S.C.A.Appendix, § 513.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Lewis Perry against Henry R. Dabney and another to recover on an account stated. From an order granting defendants' motion to dismiss and from an order denying plaintiff's motion for stay and for leave to enter default, plaintiff appeals.

Affirmed.

Morris Lavine and Milton B. Safier, both of Los Angeles, for appellant.

Robert F. Shippee, of Los Angeles, for respondents.

DESMOND, Presiding Justice.

Plaintiff appeals from an "order of the Court granting defendants' motion to dismiss and from the * * * order * * * denying plaintiff's motion for stay and for leave to enter default and/or otherwise proceed in the action," which orders were made and entered on August 20, 1945. The minute order of that date recites that defendants' motion was granted and the action dismissed under the provisions of section 581a of the Code of Civil Procedure.

On March 29, 1940, plaintiff, appearing in propria persona, filed an action against defendants in the superior court of Los Angeles County. The complaint alleged that defendants were indebted to one Etta Lee Mindrup in the sum of $3,490.15 on an account stated and that the latter had assigned to plaintiff all of her right, title and interest in the account. A copy of the summons and complaint was served upon both defendants in the city of Long Beach on September 26, 1941. The original summons, with proof of service endorsed thereon, was duly returned and filed the same day. On October 27, 1941, plaintiff substituted, in place of himself in propria persona, an attorney named John Leo Harris. Six months later and in the month of April, 1942, Harris was inducted into the Navy and in so far as the record shows was still on active duty in the military service of the United States as of August, 1945. Defendants did not file answers at any time and no default was taken or judgment by default entered against them. Defendants, on July 20, 1945, filed their motion to dismiss the action "for want of prosecution," pursuant to the provisions of section 581a of the Code of Civil Procedure. Thereafter and on August 16, 1945, present counsel for plaintiff, who had been appointed as such by order of court on August 6, 1945, in the place and stead of John Leo Harris, filed a motion to stay the proceedings "and for leave to enter default and/or otherwise proceed in this action," on the ground that "John Leo Harris, as attorney for plaintiff, is involved in the said law suit and that by reason of the failure of John Leo Harris to cause the entry of a default and default judgment and/or otherwise proceed in this action, the said John Leo Harris, a person in the military service, would be and is secondarily liable for his negligence and failure to cause the entry of said default and default judgment and/or otherwise proceed in said action unless this court stays the proceedings and permits plaintiff to enter the default of defendants and/or otherwise proceed in this action." An affidavit filed on behalf of plaintiff alleged that he was at no time informed that his attorney had entered the military service and given up his practice and that "no one else, as far as affiant knows, was taking care of the cases," and that he did not learn that his attorney had entered the military service until he was served with defendants' motion to dismiss.

Section 581a of the Code of Civil Procedure provides that actions *must* be dismissed by the court in which the same shall have been commenced on its own motion, or on motion of any party interested therein (1) where summons has not issued within one year, (2) where summons has not been served and returned within three years, unless defendant appears within three years, and (3) where summons has been served, but no answer has been filed, if plaintiff fails to have judgment entered within three years after service of summons.

It is apparent that the instant case falls within the third contingency above set forth, which comprises the last paragraph of section 581a, added by amendment in

1933. In discussing the effect of that paragraph, (3) supra, the court in Lynch v. Bencini, 1941, 17 Cal.2d 521, at page 532, 110 P.2d 662, at page 668, said:

"'* * * the last paragraph of section 581a, taken as a whole, imposes a duty upon the plaintiff and imposes a duty on the court to dismiss the action if the plaintiff fails to perform that duty. While formerly the only duty in such a case was one resting upon the clerk, with no penalty for his delay, it is now made the duty of the plaintiff to "have judgment entered" within the prescribed time, in other words to take affirmative steps to that end.

"'When the plaintiff fails to perform that duty his rights are affected and a benefit is conferred upon the defendant by the provision that the court must dismiss the action. The duty thus imposed on the court, however, is not confined to where such action is requested by the defendant but is one which the court is required to exercise "on its own motion." This statutory provision is clearly intended to apply to cases where the defendant is not yet taking any steps for his own protection. Clearly, under the statute, it is error for the court to fail to perform this duty directly imposed upon it.'" See, also, Jacks v. Lewis, 1943, 61 Cal.App.2d 148, 142 P.2d 358.

Appellant concedes "that the order dismissing the action would be proper except for the provisions of the Soldiers' and Sailors' Civil Relief Act" of 1940, 54 U.S. Stat. at Large, p. 1178, 50 U.S.C.A.Appendix, § 501 et seq., and relies particularly on section 513 thereof, which is entitled "Protection of persons secondarily liable." An examination of that section clearly indicates its inapplicability to the situation involved in the instant case. It provides, in part, as follows: "(1) Whenever pursuant to any of the provisions of this Act the enforcement of any obligation or liability, the prosecution of any suit or proceeding, the entry or enforcement of any order, writ, judgment, or decree, or the performance of any other act, may be stayed, postponed, or suspended, such stay, postponement, or suspension may, in the discretion of the court, likewise be granted to sureties, guarantors, endorsers, accommodation makers, and others, whether primarily or secondarily subject to the obligation or liability, the performance or enforcement of which is stayed, postponed, or suspended. * * *" In attempting to bring the instant case within this section, appellant argues that because his attorney enlisted in the military service of the United States without having default and judgment entered against respondents, and permitted that condition to continue for more than three years after service of summons, the plaintiff should be entitled to have the matter stayed, and the failure of the court to permit the stay now subjects the attorney to an action for malpractice, the effect of which would be to make the attorney secondarily liable upon the obligation sued for. The fallacy of this reasoning is obvious, for whatever action, if any, the plaintiff may have against his attorney would be based upon an entirely different cause from the obligation sued upon. It follows, therefore, that the attorney is not included within the category of those for whose protection section 513 was enacted, namely, "sureties, guarantors, endorsers, accommodation makers, and others, * * * *subject to the obligation or liability,* the performance or enforcement of which is stayed, postponed, or suspended. * * *" (Italics ours.) See Modern Industrial Bank v. Zaentz, 1941, 177 Misc. 132, 29 N.Y.S.2d 969. We have not been directed to, nor have we been able to find, any authority which upholds appellant's contention that a pending action may be stayed for the benefit of a plaintiff or defendant merely because an attorney representing either party has been inducted into the military service.

Commenting upon appellant's statement in his affidavit that he "did not learn that his attorney had entered the military service until he was served with defendants' motion to dismiss," we find it surprising that so long a time, almost four years after service of summons, was allowed to elapse without action on appellant's part.

The orders are affirmed.

SHINN and WOOD, JJ., concur.

76 Cal.App.2d 427

HARVEY MACH. CO., Inc., v. ALVAREZ et al.

Civ. 15487.

District Court of Appeal, Second District, Division 2, California.

Oct. 9, 1946.

1. Action ⚷6

In action for declaratory judgment, employer's complaint setting forth collective bargaining agreement with defendant unions, which provided for arbitration of agreements, and describing controversy as to whether warning notice given to defendant employees was within grievance procedure required by the agreement, stated a cause of action.

2. Action ⚷6

A complaint for declaratory relief is sufficient if it sets forth facts showing an actual controversy relating to legal rights and duties under a written contract and requests court to adjudicate these rights and duties.

3. Action ⚷6

Actual or attempted compliance with arbitration clause in collective bargaining contract was not a condition precedent to employer's right to sue for declaration that particular dispute was not subject to the arbitration clause.

4. Action ⚷6

Declaratory relief is a proper remedy to ascertain whether particular grievance arising under a written contract is properly subject to arbitration clause in such contract.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Harvey Machine Company, Incorporated, against Lucy Alvarez and others, for declaratory judgment interpreting a collective bargaining agreement. From a judgment for defendants, plaintiff appeals.

Reversed with directions.

Hindin, Weiss and Girard, of Los Angeles, for appellant.

Katz, Gallagher & Margolis, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants predicated upon the sustaining of their demurrer to a complaint for declaratory relief, plaintiff appeals.[1]

The undisputed facts are these:

It was alleged in the complaint that plaintiff and defendants had entered into a written contract commonly known as a collective bargaining agreement and that a dispute had arisen between the parties as to the interpretation of certain provisions in such agreement. The agreement was made a part of the complaint and attached thereto. In the agreement were appropriate clauses providing for arbitration of disputes between the parties arising under the contract. Plaintiff prayed that the court declare its rights, duties and obligations under the terms of the written agreement.[2]

Defendants demurred to the complaint on the grounds that (1) it failed to state a cause of action, and (2) the court had no jurisdiction of the subject matter of the action because the agreement contained a clause providing for arbitration of any grievance or dispute arising under the terms of the agreement and that plaintiff had not alleged that it had exhausted its remedy under the arbitration clause in the contract. The demurrer was sustained.

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[1] It is to be noted that defendants have not favored this court with either a brief or oral argument.

[2] Omitting the title of the court and cause the complaint read as follows:

"Comes now the plaintiff and for cause of action against the defendants and each of them allege:

I

"That at all times herein alleged the plaintiff was and is a corporation organized and existing under the laws of the State of California and having its principal place of business in the County of Los Angeles, State of California.

II

"That at all times mentioned herein the defendants Western Mechanics Local Union No. 700 and the International Union, Mine, Mill and Smelter Workers, C.I.O. were and are unincorporated associations, organized and operating as trade unions and acting as the collective bargaining representatives of the employees of the plaintiff corporation. That at all times mentioned herein, the defendant Aaron Weiselman was and is an agent, and officer of the defendant unions and an employee of the plaintiff corporation. * * *

There are two questions necessary for us to determine which will be stated and answered hereunder seriatim:

First: *Did the complaint state a cause of action?*

[1, 2] This question must be answered in the affirmative. The law is established in California that a complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written contract and requests that these rights and duties be adjudicated by the court. (Columbia Pictures Corp. v. DeToth, 26 Cal.2d 753, 760, 161 P.2d 217.) In the instant case the complaint met each of the foregoing requirements.

Second: *Was it a condition precedent to plaintiff's right to maintain an action for declaratory relief that it allege compliance or an attempt by it to comply with the*

III

"That on or about the 17th day of August 1944 the plaintiff and the defendant unions and each of them made and executed an agreement in writing, hereinafter referred to as the collective bargaining agreement, a copy of the said agreement being attached hereto and incorporated herein by reference thereto as fully as if the said agreement were set forth in detail in the body of this complaint, and marked Exhibit 'A'.

IV

"That at all times mentioned herein the defendants Aaron Weiselman and Lucy Alvarez were and are employees of the plaintiff corporation.

"That the defendant Aaron Weiselman and the defendant Lucy Alvarez on or about the 27th day of June 1945 and the 7th day of June 1945 respectively, were issued a warning notice by the plaintiff. That a copy of the said warning notices are attached hereto and incorporated herein by reference thereto and marked exhibits 'B' and 'C' respectively. That thereafter the aforesaid defendants executed and delivered to the plaintiff instruments in writing entitled 'grievances,' and copy of which said grievances are attached hereto and incorporated herein by reference thereto and marked Exhibits 'D' and 'E' respectively. That the aforesaid defendant, Aaron Weiselman, has not been discharged by the plaintiff but is still in the employ of the plaintiff. That the defendant, Lucy Alvarez, was discharged by the plaintiff on July 12, 1945 for reasons and grounds different and distinct from matters specified in the aforesaid warning notices.

V

"That an actual controversy has arisen between the parties concerning the interpretation of the collective bargaining agreement and the respective rights, duties, and obligations of the parties hereto as is more fully set forth hereinafter, and a declaration of the such rights, duties, and obligations of the parties is sought the plaintiff by this action.

VI

"Plaintiff contends that under the terms of the collective bargaining agreement as is hereinabove set forth, a warning notice is not the proper subject matter of a grievance unless and until the employee is finally discharged or terminated on the same grounds and for the same cause as specified in the warning notice. Plaintiff further contends that the alleged grievances attached hereto and marked exhibits 'D' and 'E' respectively do not constitute grievances which are subject to the grievance procedure and arbitration by the parties. The defendants contend to the contrary.

"Wherefore, plaintiff prays that the defendants appear in the within action and set forth their respective claims, and that

"1. The court declare the rights, duties, and obligations of the parties under the terms of the collective bargaining agreement and

"2. The alleged grievances of the defendants Aaron Weiselman and Lucy Alvarez a copy of which are attached hereto and marked exhibits 'D' and 'E' respectively be declared by the court not to be constitute grievances within the meaning of the aforesaid collective bargaining agreement and that they are not subject to the grievance procedure and arbitration under the terms of the collective bargaining agreement,

"3. For costs of suit and

"4. For such other and further relief as to the court may seem meet, just and equitable in the premises."

arbitration clause set forth in the contract?

[3, 4] This question must be answered in the negative. Declaratory relief is a proper remedy to ascertain whether any particular grievance arising under a written contract is properly subject to arbitration under an arbitration clause in an agreement. (Texoma Nat. Gas. Co. v. Oil Workers et al., 58 F.Supp. 132, 134 et seq., affirmed in 146 F.2d 62, certiorari denied by the U. S. Supreme Court, 324 U.S. 872, 65 S.Ct. 1017, 89 L.Ed. 1426.)

In view of the foregoing rule it was unnecessary for plaintiff to allege in its complaint compliance or an attempt to comply with the terms of the arbitration clause in the contract prior to instituting the instant suit.

For the foregoing reasons the judgment is reversed with directions to the trial court to overrule defendants' demurrer and to allow them a reasonable time within which to answer plaintiff's complaint if they be so advised.

MOORE, P. J., and WILSON, J., concur.

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76 Cal.App.2d 415

NATIONAL AUTOMOBILE & CASUALTY INS. CO. v. GARRISON, State Insurance Commissioner.

Civ. 15305.

District Court of Appeal, Second District, Division 2, California.
Oct. 9, 1946.

1. Insurance 🔑10

Under statute providing that before hearing has commenced governmental agency "shall" issue subpoenas, and that, after hearing has commenced, agency or hearing officer "may" issue subpoenas, "shall" means "must" and "may" means "to have power", so that insurance commissioner must issue subpoena duces tecum if requested before hearing, but, if application is made after hearing is commenced, commissioner may issue such subpoena. Government Code, § 11510(a); Code Civ. Proc. § 1985.

See Words and Phrases, Permanent Edition, for all other definitions of "May" and "Shall".

2. Mandamus 🔑71

A ministerial officer may be compelled by mandamus to do an act only when the law specifically requires him to perform the act, and in absence of such a showing mandamus writ may not issue.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Mandamus proceeding by the National Automobile & Casualty Insurance Company against Maynard Garrison, as Insurance Commissioner of the State of California, requiring defendant to issue certain subpoenas duces tecum. From a judgment discharging an alternative writ and denying a peremptory writ, petitioner appeals.

Affirmed.

Wright and Millikan, of Los Angeles, Neil Cunningham, of San Francisco, and Irving A. Gale, of Los Angeles, for appellant.

Robert W. Kenny, of San Francisco, and Walter L. Bowers, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment discharging an alternative writ of mandate and denying a peremptory writ requiring defendant to issue certain subpoenas duces tecum, petitioner appeals.

The essential facts are these:

Petitioner was an insurance corporation duly authorized by certificate issued by the respondent to transact certain classes of insurance business in this state. Respondent had ordered petitioner to appear before him to show cause why its certificate of authority to transact business should not be revoked.

During the course of the hearing petitioner, on September 6, 1945, made written request upon respondent for the issuance forthwith of certain subpoenas duces tecum. Respondent refused to issue such subpoenas for the reason that petitioner had failed to submit an affidavit setting forth the asserted materiality of the evidence sought to be produced. Thereafter petitioner submitted an affidavit in support of his request for such subpoenas duces tecum. Respondent refused to issue the subpoenas duces tecum forthwith, but stated that he would consider whether or not the matters sought to be produced were material to any issue in the hearing.

A continuance was then granted to permit petitioner to file the present proceeding in the superior court. The trial court denied the petition upon the ground that respondent was vested with a discretion in determining whether the subpoenas duces tecum should issue or not, and was not required to issue them forthwith as a matter of course.

This is the sole question necessary for us to determine:

Under section 11510 of the Government Code, does respondent have any discretion in issuing a subpoena duces tecum upon request after a hearing in a case has commenced?

This question must be answered in the affirmative. Section 11510(a) of the Government Code reads as follows:

"Before the hearing has commenced the agency *shall issue* subpenas and subpenas duces tecum at the request of any party in accordance with the provisions of Section 1985 of the Code of Civil Procedure. After the hearing has commenced the agency itself hearing a case or a hearing officer sitting alone *may issue* subpenas and subpenas duces tecum." (Italics added.)

It is clear from a reading of the foregoing code provision that it is mandatory upon the commissioner to issue forthwith a subpoena duces tecum when requested by a party in accordance with the provision of section 1985 of the Code of Civil Procedure *before a hearing* has commenced. It is likewise clear from the language in the quoted code section that it is discretionary with respondent whether a subpoena duces tecum issue after a hearing has commenced. Obviously if a proper showing including the materiality of the evidence to be introduced is brought to the attention of respondent, it would be an abuse of discretion to deny a petitioner's request for a subpoena duces tecum. However, in the absence of such a proper showing respondent would be justified in denying such request.

[1] There is no need to enter into an involved and lengthy discussion as to the meaning of the words "shall" and "may" as used in the above section. The legislature has used both words in the same section and must be presumed to have attached to them their ordinary meanings. "Shall" means "must" (Vol. 2, Webster's New Inter. Dict. [1939] p. 2300), while "may" means "to have power" (Webster's New Inter. Dict. [1939] p. 1517).

Applying these definitions to the instant case, a commissioner must issue a subpoena duces tecum if requested before the hearing and the provisions of section 1985 of the Code of Civil Procedure have been met. On the other hand, if the application is made after the hearing is commenced, respondent has the power to issue the subpoena if in his opinion it appears among other things that the evidence sought to be produced is material to an issue or issues before him.

[2] Since in the present case the application was made after the hearing was commenced, respondent was correct in taking the position that he was not required to issue the subpoena duces tecum forthwith but could consider the materiality of the evidence sought to be produced. The trial court's ruling was therefore correct, since it is unnecessary to cite authority in support of the proposition that a ministerial officer may be compelled by mandamus to do an act only when the law specifically requires him to perform the act, and in the absence of such a showing the writ may not issue.

Southern Pacific Co. v. Superior Court, 15 Cal.2d 206, 100 P.2d 302, 130 A.L.R. 323, relied on by petitioner, is inapplicable for the reason that in the cited case the application was made before the hearing had commenced and not afterwards as in the present case.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

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76 Cal.App.2d 281

LEAHEY v. DEPARTMENT OF WATER AND POWER OF CITY OF LOS ANGELES et al.

Civ. 15239.

District Court of Appeal, Second District, Division 2, California.

Oct. 2, 1946.

Hearing Denied Nov. 25, 1946.

1. Mandamus 🔑3(4)

Action by civil service employee for declaratory relief was cumulative, and such employee was also afforded remedy of mandamus, which may be invoked to compel admission of a person to a position to which he is entitled and to which an administrative board has refused to admit him and generally to require administrative agencies to perform acts which law requires of them. Code Civ.Proc. §§ 1060, 1062, 1085.

2. Action 🔑6

The purpose of code section authorizing action for declaratory relief is to provide a ready and speedy remedy in cases of actual controversy relating to the legal rights and duties of the respective parties. Code Civ.Proc. § 1060.

3. Mandamus 🔑3(2)

An action for declaratory relief with respect to a matter wherein mandamus would lie is not as speedy and adequate as mandamus, since declaratory judgment would merely declare that plaintiff was entitled to certain relief and that it was duty of defendant to do certain things whereas writ of mandate would command performance by defendant of duties which court determined should be performed. Code Civ.Proc. §§ 1060, 1085.

4. Limitation of actions 🔑16

Where plaintiff, with respect to his right to a civil service position, had option to seek a declaratory judgment or to apply for a writ of mandate to compel Civil Service Commission to classify him in such position and compel particular department of city to assign him to such position and pay him appropriate salary, or to seek both forms of relief concurrently, plaintiff could not avoid effect of statute of limitations relevant to mandamus proceeding, by seeking declaratory relief only. Code Civ.Proc. § 312; § 338, subd. 1; §§ 343, 363, 1060, 1085.

5. Limitation of actions 🔑16

The word "action", as used in requirement that civil actions must be commenced within periods prescribed in the code after cause of action shall have accrued, includes special proceedings of a civil nature. Code Civ.Proc. §§ 312, 363.

See Words and Phrases, Permanent Edition, for all other definitions of "Action".

6. Limitation of actions 🔑43

A cause of action, as respects limitations, "accrues" when a suit may be maintained thereon and the statute of limitations begins to run at date of accrual.

See Words and Phrases, Permanent Edition, for all other definitions of "Accrue".

7. Limitation of actions 🔑58(2)

An application for a writ of mandate to compel reinstatement of a public official who had been dismissed is barred by limitations unless proceeding is commenced within three years after the dismissal. Code Civ.Proc. § 338, subd. 1.

8. Limitation of actions 🔑16

A declaratory action is governed by the same limitations as are applicable to other forms of relief, since the nature of right sued upon, and not form of action or relief demanded, determines applicability of statute of limitations. Code Civ.Proc. §§ 312, 1060.

9. Limitation of actions ⚷34(2)

A city charter is a statute of the state and an action thereunder, as respects limitations, is governed accordingly. Code Civ.Proc. § 312; § 338, subd. 1.

10. Limitation of actions ⚷58(2)

Where city civil service employee, when new Los Angeles charter became effective, was classified as superintendent of electrical construction in the department of water and power, his right under the charter to be classified as electrical engineer because of the performance of duties of such position more than six months before effective date of charter accrued by reason of the charter upon its effective date, and his action for declaratory relief, 16 years later, to determine proper classification, was barred by three-year statute of limitations. St.1925, p. 1069, § 121; Code Civ.Proc. § 338, subd. 1; § 1060.

11. Limitation of actions ⚷66(3), 95(1)

A city employee whose rights are fully accrued under a charter provision may not postpone his action and escape operation of statute of limitations indefinitely either by failing to demand what was his due or by a general affirmation of ignorance of effect of statute with relation to subject involved. Code Civ.Proc. §§ 312, 1060.

12. Limitation of actions ⚷179(2)

Allegation by employee of city department of water and power that rights derived by employees in such department under provision of city charter, including employee's own right, were not determined until a specified judicial decision, did not excuse his failure to assert his own rights to a higher civil service classification by making a timely demand upon appropriate officers and pursuing his legal remedy without delay in event of refusal of demand. Code Civ.Proc. §§ 312, 1060.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Edward F. Leahey against the Department of Water and Power of the City of Los Angeles and others for a declaratory judgment with respect to plaintiff's civil service rating. **From a judgment for plaintiff, defendants appeal.**

Reversed with directions.

Ray L. Chesebro, City Atty., Gilmore Tillman, Chief Asst. City Atty., and A. L. Lawson, Deputy City Atty., all of Los Angeles, for appellants.

Loren A. Butts, of Los Angeles, for respondent.

WILSON, Justice.

To obtain a declaratory judgment that respondent is entitled to have a civil service rating in the class of Principal Electrical Engineer in the classified civil service of the City of Los Angeles instead of the rating of Superintendent of Electrical Construction, and that he is entitled to occupy a position of the former class in the Department of Water and Power of said city, is the purpose of this action.

Section 121 of the City Charter which took effect on July 1, 1925, in so far as applicable to the case, reads as follows: "All officers and employees who, at the time of taking effect of this Article, would be included in the classified civil service, and who shall have been continuously in the service of the city for a period of six months prior to the adoption of this Article, shall be deemed to have the necessary qualifications required by the provisions hereof, and shall retain their respective positions until removed for cause, as provided herein." Stats.1925, pp. 1024, 1069.

Respondent was employed in 1921 as a Superintendent of Electrical Construction in what was then known as the Department of Public Service, now designated as Department of Water and Power, and ever since said date has been employed under that designation. He alleges that on July 1, 1925, the effective date of the new charter, and for more than six months prior thereto, he had been assigned to duty as an Electrical Engineer, which was a position in the classified civil service of the city, and that he had the necessary qualifications for the position; that at all times since the adoption of the charter, and for more than six months prior thereto, he has performed the duties of said last named position, and no other; that the position of Electrical Engineer is now known as Principal Electrical Engineer.

It is further alleged that after the decision of the District Court of Appeal on June 27, 1941, in the case of Bente v. Department of Water and Power, 45 Cal.App. 2d 589, 114 P.2d 699, holding that persons employed by the city on the date on which the charter of 1925 became effective were blanketed into the classified civil service of the city, the Civil Service Commission began a survey for the purpose of determining which employees of the Department of Water and Power, if any, were entitled to rights under section 121 of the charter which had not previously been recognized, and on October 3, 1944, the commission made a finding that respondent was not entitled to hold or occupy the position of Electrical Engineer. Alleging that an actual controversy exists concerning the rights acquired by him by reason of the quoted provisions of the charter, respondent sought and obtained a declaratory judgment that he is entitled to occupy the position designated as Principal Electrical Engineer and to be paid the salary incidental to the position. Defendant commissions and the members thereof have appealed from the judgment.

Among other defenses appellants pleaded that the action is barred by the provisions of subsection 1 of section 338 of the Code of Civil Procedure, which limits the commencement of an action upon a liability created by statute to three years after the cause of action shall have accrued (sec. 312), and section 343, prescribing a four-year period for the commencement of actions for relief not otherwise provided for in the preceding sections of the code. Since we have concluded that this defense must be sustained it will not be necessary to determine any of the other points discussed in the briefs.

[1] Appellants have not questioned the right of respondent to maintain an action for declaratory relief when another form of action will completely determine the rights of the parties. Assuming that a declaratory action is available to respondent (Code Civ.Proc. § 1060), nevertheless that form of redress is cumulative and not exclusive. Sec. 1062. He was afforded the alternative remedy of mandamus proceedings which may be invoked to compel the admission of a person to a position to which he is entitled and to which an administrative board has refused to admit him (Code Civ.Proc. § 1085; Lotts v. Board of Park Com'rs, 13 Cal.App.2d 625, 634, 57 P.2d 215; Shannon v. City of Los Angeles, 205 Cal. 366, 372, 270 P. 682) and generally to require administrative agencies to perform acts which the law requires of them. Bodinson Mfg. Co. v. California Employment Comm., 17 Cal.2d 321, 329, 109 P.2d 935, and cases cited.

[2, 3] The purpose of section 1060 of the Code of Civil Procedure is to provide a ready and speedy remedy "in cases of actual controversy relating to the legal rights and duties of the respective parties." Welfare Inv. Co. v. Stowell, 132 Cal.App. 275, 278, 22 P.2d 529. The qualification that the alternative remedy must be speedy and adequate (see Maguire v. Hibernia S. & L. Soc., 23 Cal.2d 719, 732, 146 P.2d 673, 151 A.L.R. 1062; Henderson v. Oroville-Wyandotte Irr. Dist., 207 Cal. 215, 216, 277 P. 487) is rendered innocuous by the fact that the relief supplied by section 1060 is no more adequate and no speedier than that which may be had under a petition for a writ of mandate. In fact the judgment in this case declares that "plaintiff is entitled" to certain relief and that "it is the duty of defendants" to do certain things, whereas in a mandamus proceeding defendants would have been commanded to perform the duties which the court determined should be performed.

[4] Since respondent had three options: (1) To seek a declaratory judgment of his rights under said section 1060, or (2) to apply for a writ of mandate to compel the Civil Service Commission to classify him as Principal Electrical Engineer and the Department of Water and Power to assign him to such position and to pay him the appropriate salary, or (3) to seek both forms of relief concurrently, he cannot avoid the effect of the statute of limitations relevant to mandamus proceedings by seeking declaratory relief only. The availabil-

ity of declaratory relief "would seem to suggest that the ability to maintain a suit therefor is not the criterion for determining when the statute of limitations commences to run against an action of that nature. * * * We are of the opinion that the period of limitations applicable to ordinary actions at law and suits in equity should be applied in like manner to actions for declaratory relief. Thus, if declaratory relief is sought with reference to an obligation which has been breached and the right to commence an action for 'coercive' relief upon the cause of action arising therefrom is barred by the statute, the right to declaratory relief is likewise barred." Maguire v. Hibernia S. & L. Soc., supra [23 Cal.2d 719, 146 P.2d 680].

[5-7] Civil actions must be commenced within the periods prescribed in the code, "after the cause of action shall have accrued." Code Civ.Proc. § 312. The word "action," as used with reference to the code provisions limiting the time for the commencement of actions, includes special proceedings of a civil nature. Code Civ. Proc. § 363; Barnes v. Glide, 117 Cal. 1, 6, 48 P. 804, 59 Am.St.Rep. 153. The term "accrue" means: "To come into existence as an enforceable claim; to vest as a right; as, a cause of action has accrued when the right to sue has become vested." Webster's New International Dictionary. A cause of action accrues when a suit may be maintained thereon, and the statute of limitations begins to run at the date of accrual. Dillon v. Board of Pension Com'rs, 18 Cal.2d 427, 430, 116 P. 2d 37, 136 A.L.R. 800; Osborn v. Hopkins, 160 Cal. 501, 506, 117 P. 519, Ann.Cas. 1913A, 413. An application for a writ of mandate to compel the reinstatement of a public official who has been dismissed is barred by the statute unless the proceeding is commenced within three years after the dismissal. Code Civ.Proc. § 338, subd. 1; Curtin v. Board of Police Com'rs, 74 Cal. App. 77, 82, 239 P. 355; Jones v. Board of Police Com'rs, 141 Cal. 96, 98, 74 P. 696; Wittman v. Board of Police Com'rs, 19 Cal.App. 229, 231, 125 P. 265; Hermanson v. Board of Pension Com'rs, 219 Cal. 622, 624, 28 P.2d 21.

[8, 9] A declaratory action is governed by the same limitations as are applicable to other forms of relief. Monahan v. Department of Water and Power, 48 Cal.App.2d 746, 751, 120 P.2d 730. The nature of the right sued upon, and not the form of the action nor the relief demanded, determines the applicability of the statute of limitations. Maguire v. Hibernia S. & L. Soc., supra; Bell v. Bank of California, 153 Cal. 234, 243, 94 P. 889; Banks v. Stockton, 149 Cal. 599, 602, 87 P. 83. Respondent is endeavoring to enforce a liability claimed to have been created in his favor by the City Charter, save for the existence of which no relief would be possible and this action would not have been brought. A charter is a statute of the state (Stern v. City Council, 25 Cal.App. 685, 688, 145 P. 167; C. J. Kubach Co. v. McGuire, 199 Cal. 215, 217, 248 P. 676; Whitmore v. Brown, 207 Cal. 473, 481, 279 P. 447) and an action thereunder is governed accordingly.

[10] Respondent's right, if any he had, to the classification now claimed by him accrued, if at all, on July 1, 1925, when the new charter became effective. He was then classified as Superintendent of Electrical Construction, and if, notwithstanding such classification, he had been performing the duties of Electrical Engineer and was entitled to be classified under the latter designation such right accrued and was acquired by reason of the charter and upon its effective date. Without complaint or protest he continued in his former classification until 1941, when the survey was begun by the Civil Service Commission, resulting in its refusal to reclassify him. At any time during that period of 16 years he could have demanded a reclassification and could have maintained an appropriate proceeding for the purpose of determining and enforcing the rights to which, during that entire period, he asserts he was entitled.

Whether an action for declaratory relief is an equitable proceeding or an action at law the statute of limitations is pertinent. Respondent cites Salada Beach etc. Dist. v. Anderson, 50 Cal.App.2d 306, 308, 123 P.2d 86, wherein it is said that the statute does not begin to run against the right to an action for declaratory relief until an actual controversy has *accrued* or occurred. There can be no assumption in the instant case, as there was in the Salada Beach case, that the controversy did not arise until shortly before the commencement of the action. The facts pleaded in the complaint at bar show conclusively that the controversy *accrued* upon the effective date of the charter.

[11] There could have been no actual controversy between respondent and appellants until he had made a claim or presented a demand to the city officials and they had refused to recognize it. Whatever right he may have had having fully accrued in 1925, he could not postpone his action and escape the operation of the statute of limitations indefinitely either by failing to demand what he claims was his due (Wittman v. Board of Police Com'rs, 19 Cal.App. 229, 231, 125 P. 265; County of San Luis Obispo v. Gage, 139 Cal. 398, 408, 73 P. 174; Barnes v. Glide, 117 Cal. 1, 8, 48 P. 804, 59 Am.St.Rep. 153) or by a general affirmation of ignorance for 16 years of the effect of the statute (the City Charter) with relation to the subject involved (his right to reclassification). Yasunaga v. Stockburger, 43 Cal.App.2d 396, 401, 111 P.2d 34. An assertion of ignorance of one's rights at one time and of knowledge at another will not operate to toll the statute. Wood v. Carpenter, 101 U.S. 135, 140, 25 L.Ed. 807, 808; Easton v. Geller, 116 Cal.App. 577, 580, 3 P.2d 74; Phelps v. Grady, 168 Cal. 73, 78, 141 P. 926.

[12] Respondent attempted to plead around the statute of limitations by alleging that the rights derived by employees in the Department of Water and Power by virtue of section 121 of the charter, including his own rights, were not determined until the decision in Bente v. Department of Water and Power, supra, 45 Cal.App.2d 589, 114 P.2d 699, and that after that decision the Civil Service Commission made a survey for the purpose of determining which employees of the city were entitled to rights under that section. This allegation does not exculpate him for his failure to assert his own rights by making a demand therefor on the appropriate officers or commissions of the city, and, if his demand had been refused, by pursuing his remedy in court without delay. For 16 years prior to the decision in the Bente case his situation and his classification remained the same and he offers no excuse for having failed during that period to prosecute an action in his own behalf similar to that brought by Bente.

Judgment reversed with directions to enter judgment in favor of defendants.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

29 Cal.2d 119

STILLWELL v. STATE BAR et al.

L. A. 19881.

Supreme Court of California, in Bank.

Oct. 1, 1946.

1. Attorney and client 🔑6

The words "the bar" as used in statute authorizing admission of law school graduates who after September 16, 1940, and prior to termination of war, graduated from law schools and entered the armed forces before taking an examination for admission to "the bar" means the California bar, and not the bar of any other state. Business and Professions Code, § 6060.5.

See Words and Phrases, Permanent Edition, for all other definitions of "The Bar".

2. Attorney and client 🔑6
Statutes 🔑225½

Statute authorizing admission of law school graduates who after September 16, 1940, and prior to termination of war, graduated from law schools and entered the armed forces before taking an examination for admission to the bar, supersedes, but does not repeal general statute dealing with requirements for admission to the bar, to the extent that there is a conflict between the two statutes. Business and Professions Code, §§ 6060(d, h), 6060.5.

3. Statutes 🔑209

When a word or phrase has been given a particular scope or meaning in one part of a statute, it should be given the same scope and meaning in the other parts of the statute.

4. Statutes 🔑230

The context of temporary amendatory legislation should be interpreted consistently with the original and permanent legislation.

5. Statutes 🔑184

The Legislature's intent in enacting a statute may be ascertained through the purpose and object sought to be accomplished.

6. Statutes 🔑181(1)

Where language in a statute is susceptible of more than one meaning, courts must accept that intended by the framers of the legislation, so far as their intention can be ascertained.

7. Attorney and client 🔑6

Statute authorizing admission of law school graduates who after September 16, 1940, and prior to termination of war, graduated from law schools and entered the armed forces before taking an examination for admission to the bar, should be liberally construed. Business and Professions Code, § 6060.5.

8. Attorney and client 🔑6

Purpose of statute authorizing admission of law school graduates who after September 16, 1940, and prior to termination of war, graduated from law schools, and entered the armed forces, before taking an examination for admission to the bar, is to aid California residents who, because of the war, did not have normal opportunity to take examination for admission to California bar at time of their own choosing and within a reasonable time after graduation from law school. Business and Professions Code, § 6060.5.

9. Attorney and client 🔑6

Statute authorizing admission of law school graduates who after September 16, 1940, and prior to termination of war, graduated from law school and entered the armed forces before taking an examination for admission to the bar, does not apply to law school graduates who have shown themselves, in examinations taken prior to assumption of military duties, to be unqualified for the practice of law in California. Business and Professions Code, § 6060.5.

10. Attorney and client 🔑6

One who graduated from accredited law school in Missouri in 1941 and took and passed Missouri law examination and was admitted to practice before Missouri courts on August 9, 1941, and who took up residence in California in July, 1942, and who entered marine corps in California in November, 1943, and received an honorable discharge from that service in July, 1946, was entitled to be admitted to California bar without examination. Business and Professions Code, § 6060.5.

Proceeding by Parks Stillwell, petitioner, against the State Bar of California and others, for admission to the State Bar without examination.

Petition granted.

Miller & Beck, of San Fernando, and Brown, Beery and Rognes, of Los Angeles, for petitioner.

McCutchen, Thomas, Mathew, Griffiths & Greene, and Harold A. Black, all of Los Angeles, for respondents.

SPENCE, Justice.

Petitioner's application to the Committee of Bar Examiners of the State Bar for certification to this court for admission and a license to practice law in this state, without examination, pursuant to the provisions of sections 6060 and 6060.5 of the Business and Professions Code was denied by the Committee of Bar Examiners of the State Bar for the sole reason that before entering the armed forces he took an examination for admission to the bar of another state. In this proceeding petitioner seeks an order that he be admitted, without examination, to membership in the State Bar and to practice law in the courts of the State of California.

The facts are not in dispute. Petitioner was graduated from the Law School of Washington University, St. Louis, Missouri, on June 10, 1941, being awarded an LL.B. degree. Washington University is accredited by the examining committee of the State Bar of California. Thereafter, petitioner took and passed the State of Missouri bar examination and was admitted to practice before the courts of that state by the Supreme Court of Missouri on August 9, 1941. On or about July 21, 1942, petitioner took up residence in Los Angeles, California, and on November 5, 1943, entered the United States Marine Corps at Los Angeles. He received an honorable discharge from that service on July 8, 1946. He has never taken a California bar examination.

Prior to the enactment this year of section 6060.5 of the Business and Professions Code, it was necessary that an applicant for admission to practice law should comply with the provisions of section 6060 unless he could qualify as an out-of-state attorney with four years' practice under section 6062 of said code. The requirements of section 6060 remain in force, except as modified by section 6060.5, and the requirements of section 6060 are, among others, (1) that the applicant shall "Have passed a final bar examination given by the examining committee" of The State Bar (subd. h), and (2) that the applicant shall "Have been a bona fide resident of this State for at least three months immediately prior to the date of his final bar examination." (Subd. d.)

The recent 56th (1st extraordinary) Session of the Legislature of this state passed an act to add section 6060.5 to the Business and Professions Code, chapter 65, pertaining to the admission on motion, without examination of certain classes of law school graduates. The proposed legislation was approved by the governor on March 2, 1946. It reads as follows:

"6060.5. The provisions of subdivisions (d) and (h) of Section 6060 do not apply to any person who, after September 16, 1940, and prior to the termination of hostilities between the United States and the nations with which the United States is now at war as determined by Act of Congress or Proclamation of the President, has graduated from a law school accredited by the examining board and who after such graduation served in the armed forces of the United States *before taking an examination for admission to the bar,* nor to any person, who, after September 16, 1940 satisfactorily completed at least two years of study at a law school then accredited by the examining board and whose legal education was thereafter interrupted by his service in the armed forces of the United States, and who subsequently graduates from a law school accredited by the examining board. The provisions of this section shall not apply to any person who enters the armed forces of the United States after the effective date of this section, nor to any person who at the time of entering the armed forces was not a bona fide resident of this State.

"This section shall remain in effect until the ninety-first day after final adjournment of the Fifty-eighth Regular Session of the Legislature. While this section is in effect it shall supersede any existing provisions of law which are in conflict with this section; but such provisions are not repealed by this section and after this section is no longer effective shall have the same force as though this section had not been enacted." (Emphasis added.)

Owing to the limited duration of his practice, petitioner cannot comply with section 6062 of the Business and Professions Code providing for the admission of out-of-state attorneys. Therefore, in order to be admitted to practice law in this state he must qualify under sections 6060 and 6060.5. On May 20, 1946, petitioner believing that he did so qualify filed with respondent Committee of Bar Examiners an application for certification for admission on motion without examination. Such application was denied for the sole reason that petitioner "took an examination for admission to the bar after graduation and before serving in the armed forces." Thereafter, petitioner requested a reconsideration of the committee's action and on August 15, 1946, the committee determined that its former action be sustained.

[1] In response to an order to show cause, respondents take the position that the phrase "examination for admission to the bar" in section 6060.5 has no specific or sole reference to the California bar, but refers to an examination for admission to any bar. On the other hand petitioner argues that he is entitled to admission under the act, inasmuch as he did not, prior to entering the armed forces, take an examination for admission to the California bar. We find ourselves in accord with petitioner's construction of section 6060.5, both as a result of the plain language of the section read in conjunction with section 6060, and as a result of a consideration of the purpose and object sought to be accomplished by enactment of the legislation.

[2] Section 6060.5 is in effect but an amendment, of temporary duration, to section 6060, which deals in its entirety with qualifications for admission to the bar of this state, as does the whole of article 4, division 3, chapter 4 of the Business and Professions Code. The new section supersedes, but does not repeal, subdivisions (d) and (h) of section 6060 to the extent that there is a conflict. In other words the two pieces of legislation coexist, their application depending upon the individual circumstances of each particular applicant.

[3, 4] It may be presumed that the Legislature, in passing the amendatory legislation, had in mind the original act (see Robbins v. Omnibus R. Co., 32 Cal. 472, 474; 1 Sutherland on Statutory Construction, 3d Ed., § 1933), and it is a well-established rule of construction that when a word or phrase has been given a particular scope or meaning in one part or portion of a law it shall be given the same scope and meaning in other parts or portions of the law. Coleman v. City of Oakland, 110 Cal.App. 715, 295 P. 59; Ransome-Crummey Co. v. Woodhams, 29 Cal.App. 356, 156 P. 62. It seems plain that the context of the temporary amendatory legislation should be interpreted consistently with the original and permanent legislation. Thus under subdivision (h) of section 6060 an applicant must have taken and passed a California bar examination given by the examining committee, but under section 6060.5 if he served in the armed forces of the United States before taking the California bar examination, and otherwise qualifies under section 6060.5, subdivision (h) does not apply. Similarly, under subdivision (d) of section 6060, an applicant must have been a resident of this state for at least three months prior to the date of "his final bar examination" in this state, but, pursuant to section 6060.5, if he has not taken such an examination prior to entering the armed forces, he must instead have been a bona fide resident of this state at the time of entering the armed forces. If the Legislature did not have in mind any certain bar and did not intend that reference be made to the specific bar designated in section 6060, surely it would not have used the wording "the bar" in the phrase "examination for admission to the bar," but would have chosen a more generic or indefinite term such as "a bar," "any bar," or "bar of any state."

[5] Even if the meaning of the legislation were not plain we would arrive at the same result as above set forth by ascertaining the intent of the Legislature through the purpose and object sought to be accom-

plished. Gage v. Jordan, 23 Cal.2d 794, 147 P.2d 387; California Drive-In Restaurant Ass'n v. Clark, 22 Cal.2d 287, 140 P.2d 657, 147 A.L.R. 1028; City and County of San Francisco v. San Mateo County, 17 Cal.2d 814, 112 P.2d 595.

[6, 7] Where language is susceptible of more than one meaning, it is the duty of the courts to accept that intended by the framers of the legislation, so far as its intention can be ascertained. Pacific Indemnity Co. v. Industrial Acc. Comm., 215 Cal. 461, 11 P.2d 1, 82 A.L.R. 1170; City and County of San Francisco v. Industrial Acc. Comm., 183 Cal. 273, 191 P. 26; Grannis v. Superior Court, 146 Cal. 245, 247, 79 P. 891, 106 Am.St.Rep. 23. As hereinbefore mentioned, section 6060.5 was enacted during the recent 1946 extraordinary session of the Legislature, called by the governor for the stated purpose of consideration of matters affecting veterans. It is a part of a broad program in this state and as such should be liberally construed, in so far as reasonably possible, so as to effectuate its object. Department of Motor Vehicles v. Industrial Acc. Comm., 14 Cal.2d 189, 195, 93 P.2d 131; In re Haines, 195 Cal. 605, 234 P. 883; Odell v. Rihn, 19 Cal.App. 713, 719, 127 P. 802.

[8-10] The manifest purpose of section 6060.5 is to aid those residents of California, who, because of disturbed conditions and their service to their country during time of war, did not have the normal opportunity to take the examination for admission to the California bar at a time of their own choosing and within a reasonable time after graduation from law school. To require them now to take such an examination would be to impose a hardship that would not have been encountered except for such service. It seems clear that the members of the class intended to be benefited are the California veterans, that is, those who were bona fide residents of this state at the time of entering the armed forces. The requirement that an applicant should have entered the armed forces before taking an examination for admission to the bar, would seem to be to eliminate from the benefits of the act those law school graduates who had shown themselves, in examinations taken prior to the assumption of military duties, to be unqualified for the practice of law in this state. The Legislature might also, with some reason, have eliminated those who took examinations and failed to qualify elsewhere, but respondents' construction would penalize those residents of our state who industriously undertook and successfully passed examinations outside this state. Such construction would exclude from the class benefited many lifetime California residents who attended law schools of eastern universities with the intention of returning to California to practice, provided that they happened to take the bar examinations of other states before returning to California. It does not cast a different light on the picture that petitioner and perhaps some others were not residents of California when they took examinations elsewhere. Petitioner had become such a resident at the time he entered the armed forces, as required by the act, and presumably his preparation for the taking of a California bar examination was thwarted. We are of the opinion that petitioner comes within the class intended to be benefited by section 6060.5 and that he is entitled to the relief demanded.

It is therefore ordered that petitioner be admitted to membership in the State Bar of California and to practice in the courts of this state upon the payment of the fees and the taking of the oath required by law.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

76 Cal.App.2d 418

BALLEW v. DAVIS.

Civ. 15365.

District Court of Appeal, Second District, Division 2, California.

Oct. 9, 1946.

1. Assault and battery ⚷13

Defendant, in using only such force as was necessary to protect himself from bodily injury in altercation with plaintiff was within his legal rights. Civ.Code, § 50.

2. Appeal and error ⚷1029

In action by newspaper photographer against associate manager of symphony association for assault arising over attempt of photographer to use flashbulbs in taking pictures of visiting conductor where it was found on sufficient evidence that manager acted in self-defense, rulings of trial court were harmless.

3. Appeal and error ⚷905

Where record did not disclose rule applied by trial judge, it would be presumed that he applied the correct rule of law.

4. Constitutional law ⚷90

In action by newspaper photographer against associate manager of symphony association for assault in altercation arising over attempt of photographer to take pictures of a visiting conductor, where trial court found on sufficient evidence that manager acted in self-defense, photographer's contention that freedom of press was being violated was without merit, particularly where record disclosed that arrangements had been made to supply newspapers with the photographs of visiting conductor.

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Howard C. Ballew against Wilfrid Davis, also known as Wilfred Davis, for damages for an alleged assault and battery. From a judgment for defendant plaintiff appeals.

Affirmed.

Hahn, Ross & Goldstone, of Los Angeles, for appellant.

Boyle, Holmes, Fry & Garrett, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in an action to recover damages for an alleged assault and battery, plaintiff appeals.

The evidence being viewed in the light most favorable to defendant (respondent), the essential facts are these:

On April 12, 1945, about 11:30 a.m., plaintiff, a newspaper photographer, and defendant, associate manager of the Southern California Symphony Association, were waiting at the Pasadena railroad station for the arrival of a train upon which Signor Toscanini was traveling. Defendant approached plaintiff and asked him if he intended to take a flashbulb picture of Signor Toscanini. In response plaintiff replied, "Who the hell are you?" Defendant stated that he was the associate manager of the Southern California Symphony Association and again inquired whether plaintiff intended to take a flashbulb of Signor Toscanini. Upon receiving an affirmative reply defendant requested plaintiff not to take such a photograph and stated to plaintiff that the discharging or igniting of flashbulbs in the presence of Signor Toscanini was harmful to the latter, would cause him physical pain, hurt his eyes and might incapacitate him from conducting the benefit performance of the Los Angeles Philharmonic Orchestra. In reply, plaintiff said, "Who the hell is Toscanini. Get out of my way." While the above conversation was in progress the train bearing Signor Toscanini stopped at the station and he was standing in the vestibule of one of the cars. Defendant placed himself between plaintiff and Signor Toscanini, whereupon a scuffle ensued between plaintiff and defendant as a result of which plaintiff suffered injuries to his back and lacerations of three fingers of his right hand.

The trial court found that defendant acted in self-defense. The finding being thus:

"That at the time and place mentioned in paragraph I of plaintiff's complaint, the plaintiff repeatedly threatened to assault and actually assaulted the defendant and would have struck him with a camera or camera tripod or with his fists if defendant had not defended himself against the plaintiff; that in order to defend himself against said repeated assaults, defendant necessarily pushed plaintiff off his balance and laid his hands on plaintiff and held him with barely sufficient force to restrain plaintiff from doing or attempting to do bodily injury to defendant."

[1] Since the sufficiency of evidence to sustain the foregoing finding is not questioned and no other attack is made upon it, it is clear that defendant, in the altercation between the parties, used only such force as was necessary to protect himself from bodily injury. This he had a legal right to do. (Section 50, Civil Code.)

[2] In view of the fact that defendant acted in self-defense, it is immaterial whether or not (1) he used only sufficient force to prevent plaintiff from causing injury to Signor Toscanini, (2) the trial court erred in excluding expert testimony as to the effect of flashbulbs, (3) the trial court erred in permitting evidence relative to instructions given defendant by his employer, and (4) the court erred in finding that the force used by plaintiff was necessary after defendant offered to take pictures without a flashbulb.

[3, 4] There is likewise no merit in plaintiff's contention that the trial court based its judgment upon what defendant believed was necessary under the circumstances rather than upon what a reasonably prudent man would have believed under the circumstances. Since the record does not disclose the rule applied by the trial judge it will be presumed, in the absence of a showing to the contrary, that he applied the correct rule of law. Also in view of the unquestioned finding that defendant acted in self-defense, plaintiff's contention that the freedom of the press is being violated is devoid of merit. There is nothing in the evidence in this case which shows that defendant attempted or intended to prevent publication of photographs of Signor Toscanini in the public press. On the contrary the evidence established that arrangements had been made to supply the newspapers with such photographs.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

CHRISTIAN v. CALIFORNIA BANK et al.*

Civ. 15387.

District Court of Appeal, Second District, Division 2, California.

Oct. 9, 1946.

Hearing Granted Dec. 5, 1946.

1. Bills and notes 🔑211

Where payee of a check endorses it in blank, the instrument so endorsed is payable to bearer and may be negotiated by delivery. Civ.Code, § 3115.

2. Bills and notes 🔑339

Mere knowledge of facts sufficient to put a prudent man on inquiry without actual knowledge of a defect, or a mere suspicion of an infirmity or defect of title, does not preclude transferee of a negotiable instrument from occupying the position of a holder in due course.

3. Bills and notes 🔑492

Delivery of a negotiable instrument payable to bearer is conclusively presumed as to all holders in due course.

4. Banks and banking 🔑189
Bills and notes 🔑193, 363

Bearer of negotiable cashier's check endorsed in blank by payee was authorized to strike out rubber stamp endorsement following payee's endorsement directing payment to order of named partnership of which payee and bearer were members or direct bank to which bearer presented check for deposit to his personal account to strike out such endorsement, and such bank, in absence of showing of notice of any defect in instrument, became bona fide holder in due course and payee would have no cause of action against it or issuing bank for wrongfully paying the check. Civ.Code, §§ 3115, 3129.

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* Subsequent opinion 182 P.2d 554.

5. Banks and banking ⚷189
Bills and notes ⚷363

Allegations that plaintiff endorsed cashier's check payable to his order in blank placing below endorsement rubber stamp directing payment to order of named partnership of which he was a member and to deliver check to copartner for deposit to partnership account, but that copartner or copartner's bank at his direction struck out rubber stamp endorsement and copartner endorsed check and deposited it in his personal account whereupon it was paid by issuing bank did not state cause of action against either bank for wrongfully paying check in absence of allegation that bank in which copartner deposited check had notice of any defect in instrument. Civ.Code, §§ 3115, 3129.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by G. O. Christian against California Bank, a corporation, Security-First National Bank of Los Angeles, a national banking association, and others for wrongfully paying a cashier's check. From a judgment in favor of defendant banks, plaintiff appeals.

Judgment affirmed.

A. W. Brunton, of Los Angeles, for appellant.

Roane Thorpe, Swanwick, Donnelly & Proudfit, and Donald O. Welton, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant banks predicated upon the sustaining of their demurrer without leave to amend to plaintiff's complaint which sought to recover $3,500 for having wrongfully paid a cashier's check, plaintiff appeals.

The essential facts appearing in plaintiff's complaint as amended are these:

On June 4, 1945, plaintiff purchased from defendant Security Bank a cashier's check payable to his order in the amount of $3,500. Plaintiff then endorsed such check by placing his name on the back of the same. Below his endorsement was placed a rubber stamp reading thus:

"Pay to the order of
BANK OF AMERICA
303 303
National Savings & Trust
Association
S. & R. Produce Co."

Plaintiff then delivered the check to Bill Rotsios with instructions to deposit it in the Bank of America to the account of S. & R. Produce Company. Plaintiff and Mr. Rotsios had previously agreed to enter into a partnership for the conduct of a wholesale dealers' market under the name of S. & R. Produce Company. On June 5, 1945, Mr. Rotsios took the check to the California Bank, and without the knowledge or consent of plaintiff he and the defendant California Bank blocked out the rubber stamp endorsement on the back of the check and Mr. Rotsios then endorsed the check and deposited it in his personal account at the defendant California Bank. The deposit was disposed of by checks drawn by Mr. Rotsios on this account. Defendant Security Bank paid the amount of the check through the Los Angeles Clearing House to the California Bank.

This is the sole question necessary for us to determine:

Did the facts which were alleged in the complaint as amended, set forth above, constitute a cause of action against defendant banks?

This question must be answered in the negative and is governed by these pertinent rules of law:

[1] 1) Where the payee of a check, endorses it in blank, the instrument so endorsed is payable to bearer and may be negotiated by delivery. Civil Code, sec. 3115.

[2] 2) Mere knowledge of facts sufficient to put a prudent man on inquiry without actual knowledge of a defect, or a mere suspicion of an infirmity or defect of title, does not preclude the transferee of a negotiable instrument from occupying the position of a holder in due course. (Smith v. Armstrong, 85 Cal.App. 624, 631, 260 P. 347; Merced Security Saving Bank v. Bent Bros., 207 Cal. 652, 656, 279 P. 765.)

3) The holder of a negotiable instrument may at any time strike out any prior endorsement which is not necessary to his title. (Civil Code, sec. 3129.)

[3] Applying the foregoing rules to the facts of the instant case it appears that plaintiff endorsed the check in blank. Hence it was payable to the bearer and delivery of the instrument is conclusively presumed as to all holders in due course.

[4] Since there is no allegation that defendant California Bank had knowledge of any facts which would justify the conclusion that its failure to make inquiry arose from a suspicion that investigation would disclose a vice or defect in the instrument, it became a holder in due course of the check with the result that a valid delivery thereof to Mr. Rotsios was conclusively presumed.

[5] Mr. Rotsios' act in striking out the rubber stamp endorsement or directing the bank to do so was authorized under the third rule above stated. Since defendant California Bank became a bona fide holder in due course without notice of any defect in the instrument, it is clear that plaintiff has failed to state a cause of action against either or both defendant banks.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

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76 Cal.App.2d 598

PEOPLE v. PUGH.

Cr. 644.

District Court of Appeal, Fourth District, California.

Oct. 23, 1946.

1. **Automobiles 🔑354**
Criminal law 🔑1170(2)

Motorist on trial for driving automobile while under influence of liquor to left of center line of highway and thereby injuring another should have been allowed to answer question of his counsel as to why he turned automobile to the left, but error in excluding such testimony was not prejudicial, where motorist's intent to thereby avoid collision clearly appeared from his immediately preceding testimony. Vehicle Code, § 501; Const. art. 6, § 4½.

2. **Automobiles 🔑355(6)**

Evidence sustained conviction of unlawfully driving automobile while under influence of liquor to left of center line of highway and thereby injuring another. Vehicle Code, § 501.

Appeal from Superior Court, San Bernardino County; Stanley Mussell, Judge.

Lloyd Pugh was convicted of unlawfully driving an automobile while under the influence of liquor and causing bodily injury to another as proximate result of driving to the left of center line of highway, and from the judgment and an order denying his motion for new trial, he appeals.

Judgment and order affirmed.

Mark F. Jones and W. L. Engelhardt, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with a violation of section 501 of the Vehicle Code in that he unlawfully drove an automobile upon a public highway while under the influence of liquor, and while so driving unlawfully drove said automobile to the left of the center line of the highway, which act proximately caused bodily injury to one Bernice M. Russell. He was found guilty by a jury and was sentenced to serve 10 months in the county jail. This appeal is from the judgment and from an order denying his motion for a new trial.

This case arose out of a collision on the night of December 27, 1945, between an automobile driven by the defendant and another driven by Mrs. Russell. The collision occurred about 14 miles south of Victorville on the road to San Bernardino, being a part of Highway 66. The defendant was traveling north toward Victorville and Mrs. Russell was traveling south toward San Bernardino. The evidence was sufficient in all respects to sustain the conviction and no contention to the contrary is made. The only point raised on this appeal is that the court erred in refusing to permit the defendant to answer a question as to why he turned his car to the left immediately prior to the collision.

Mrs. Russell testified that as she was proceeding south in her lane of traffic she saw the other car coming north in her lane; that she first turned her wheel toward the white line "to get in his lane of traffic"; that she then turned back to the right, thinking to take to the shoulder; that the lights were very bright and she could not see what was there so she again turned to her left; and that the collision occurred before she got to the white line.

A woman who was riding in the defendant's car testified that "it was all very quick"; that the defendant changed into the left-hand lane immediately before the collision; and that she thought the other car was about 100 feet away when the defendant turned his car to the left.

The defendant testified that when the Russell car was about 200 feet away from him he noticed that it was straddling the white line; that he was then traveling in his right-hand lane; that the Russell car turned left, then right and then left again; that the last left turn "was very close to me"; that the Russell car came over on his side of the road; that when the Russell car made its second turn to its left "that brought the car in my lane" and the cars were very close together; that he did nothing until the Russell car made the second left turn; that the cars were then close together "within probably 50 feet or 60 feet"; that the Russell car was going about 50 miles an hour and his car was going 30 to 35; and that when the Russell car made its second turn to its left "I pulled my car sharp over to my left."

The defendant was then asked by his counsel "when you turned your car left, why did you turn it in that direction?" An objection to this question was sustained on the grounds that it called for a conclusion and opinion of the witness and called for a self-serving declaration. The defendant relies on the sudden peril rule and argues that since it was incumbent upon him to explain why he crossed over to his left of the center line of the highway he was entitled to testify as to his intent in so doing; that since this was the particular wrongful act with which he was charged, it was especially important that he be allowed to explain why he did so; that if he had been permitted to explain why he did this the jury might well have been convinced that he was justified in so doing; and that if the jurors had been so convinced they would necessarily have found him not guilty.

[1, 2] The defendant should have been allowed to answer this question and it may be conceded that the objection, on the grounds stated, was erroneously sustained. It does not follow, however, that prejudice resulted from this ruling. While the defendant's intent at the time in question was material to the issues involved, that intent not only sufficiently but very clearly appeared from the testimony he gave immediately preceding the asking of this question. Under such circumstances an answer to this question could not have changed the views of the jury or affected the result. People v. Moore, 48 Cal.App. 245, 191 P. 980. While there was a conflict in the evidence as to which driver was originally at fault, the defendant's testimony was very clear and definite that he saw the other car coming into his lane of traffic at a high rate of speed, and only 50 or 60 feet away, and that he then pulled his car sharply over to his left. If his testimony was to be believed at all, it disclosed that he pulled his car quickly to his left in an attempt to avoid an imminent collision with a car that was coming into his lane within a few feet of him. From his testimony, the reason for his action in turning to the left clearly and definitely appears and no other explanation was needed or was possible. It would have added nothing to the value or effect of his testi-

mony to have added a statement that he turned to his left in order to avoid a collision. This would be merely to repeat an explanation and reason already more effectively given. Under these circumstances, it cannot be held that the error in question has resulted in a miscarriage of justice. Art. VI, sec. 4½, Const. This entire matter depended upon whether the jury believed the evidence produced by the defendant or whether it believed the evidence produced by the people, and the error in question could not have affected the jury's decision in that regard. The evidence sustains the verdict and judgment, and a reading of the transcript leaves no doubt that the jury fully understood the defendant's explanation of his reason for, and intention in, turning to his left immediately before the collision.

The judgment and order are affirmed.

MARKS and GRIFFIN, JJ., concur.

76 Cal.App.2d 501

NELSON v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 7252.

District Court of Appeal, Third District, California.

Oct. 16, 1946.

1. Banks and banking 🔑263

Where bank by foreclosure of chattel mortgage on boat and sale exhausted securities for mortgage note, and balance of mortgagor's indebtedness remained unpaid, bank had the right under statute to offset the balance of the indebtedness by application of the mortgagor's credit on deposit in the bank. Civ.Code, § 3054.

2. Banks and banking 🔑263

No formal proceeding on the part of a bank is necessary to entitle the bank to the benefit of an offset under statute of a customer's deposit therein, in payment of his indebtedness to the bank, and no notice need be given by bank to customer. Civ. Code, § 3054.

3. Banks and banking 🔑263

In suit against a bank by a customer to recover funds deposited therein which bank has applied under statute to payment of customer's matured debt to the bank, bank was not required to set up that transaction as a cross-complaint and ask for affirmative relief, but bank could set up a counterclaim and ask for affirmative relief under the statute, even though customer's debt to the bank was secured by a mortgage. Civ.Code, § 3054; Code Civ.Proc. § 438.

◆

Appeal from Superior Court, Del Norte County; Samuel F. Finley, Judge.

Suit in assumpsit by William F. Nelson against the Bank of America National Trust & Savings Association, a national banking association, to recover the amount of a deposit credit in the defendant's bank, wherein defendant set up a counterclaim for balance due on plaintiff's mortgage note. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

G. H. Van Harvey, of San Francisco, for appellant.

G. D. Schilling, and R. I. McCarthy, both of San Francisco, for respondent.

THOMPSON, Justice.

The plaintiff had a deposit credit in the defendant's bank at Crescent City of $1,200. The bank held his matured note for $2,500 and accrued interest, secured by chattel mortgage on an ocean fishing boat. The bank sold the boat under the terms of the mortgage and applied the $1,200, pursuant to Section 3054 of the Civil Code, to the payment of the balance due on the note. Plaintiff sought to withdraw his deposit of $1,200, which was refused by the bank. Plaintiff brought this suit in assumpsit against the bank for said sum of $1,200. The complaint also alleged conversion of the money by the bank. The defendant answered, denying its indebtedness to plaintiff and setting up its counterclaim of the balance due on plaintiff's note. The court rendered judgment against plaintiff to the effect that he is entitled to nothing by his action for the reason that defendant was not indebted to him in any sum whatever. From that judgment plaintiff has appealed.

The appellant contends that the bank was not authorized to apply his deposit of $1,200 to the payment of his matured note for the reason that the note was secured by chattel mortgage on the boat, and that plaintiff's attorney in fact was without authority to consent to the bank's application of the deposit to the debt, or to enter into a subsequent contract for the repurchase of the boat.

The defendant conducted a banking business in Crescent City. The plaintiff had on deposit in the bank the sum of $1,200. May 7, 1938, plaintiff executed and delivered to the bank his promissory note, payable May 6, 1939, for $2,500 with interest at 7% per annum payable quarterly, secured by a chattel mortgage on an ocean motor boat named "Roamer." On account of default in payment of the note, the bank sold the boat under the terms of the mortgage for $2,300. The bank purchased the boat at that sale. There still remained unpaid on the note, including the costs of sale, an amount in excess of $1,200. The bank then applied plaintiff's deposit in the bank of $1,200, under Section 3054 of the Civil Code, toward the satisfaction of that unpaid balance of indebtedness. The evidence shows that, on April 23, 1943, there was due to the bank on account of said loan, the aggregate sum of $3,731.65.

The plaintiff had moved to Napa, California, where he resided in 1943. About April 1, 1943, on account of default in payment of the note, the defendant demanded prompt payment thereof, and after notice of default the foreclosure and sale of the boat was set for April 16th of that year. In the meantime, about April 7th, plaintiff demanded payment of his deposit of $1,200, which was refused. The appellant employed John L. Childs, an attorney at Crescent City, to represent him in the transaction, and executed to him a power of attorney for that purpose. Childs promptly conferred with the manager of the bank, who insisted on prompt payment of the note, but agreed to and did continue to April 23rd the foreclosure and sale of the boat. The bank manager asserted the right to apply plaintiff's deposit of $1,200 on payment of any balance remaining unpaid on the bank's secured note, after foreclosure and sale of the boat. Childs told the manager of the bank of his power of attorney from plaintiff. On April 22, 1943, the bank and Childs, as attorney in fact of plaintiff, executed a conditional agreement, by the terms of which it was assumed the foreclosure and sale would proceed on the following day, but that, if the bank became the purchaser of the boat at said sale for a sum not to exceed $2,700, and plaintiff assigned to the bank his title to the deposit of $1,200, and installed in the boat the engine which had been removed therefrom, and placed the boat in good "seagoing condition," and executed and delivered to the bank his note for $2,000, payable in monthly installments, secured by a "first preferred ship mortgage" on the boat, all to be performed within thirty days from April 22nd, the bank would then give plaintiff a bill of sale to the boat reconveying all its interest therein.

As a part of that transaction, at the request of the defendant, Childs communicated with the plaintiff at Napa, and sent to him a telegram, requesting authorization to transfer the $1,200 credit to the bank in part payment of his indebtedness, which was authorized by a reply telegram. In compliance therewith Childs drew and delivered to the bank a check of $1,200 on April 23rd, signed "Wm. F. Nelson, By John L. Childs, his Attorney-in-fact." The other terms and conditions of the written agreement were not fulfilled by the plaintiff. He neither installed the engine, nor placed the boat in seagoing condition. Nor did he execute the new note for $2,000 or the chattel mortgage as security therefor. The appellant contends that the agreement was unauthorized and void.

April 23rd, the foreclosure sale was held pursuant to the terms of the chattel mortgage. The defendant bought the boat for $2,300. The uncontradicted evidence shows that the costs of sale amounted to $514.03. The defendant then applied the net purchase price of the boat, amounting to $1,785.97 to the payment of the secured note and accumulated interest. The security was thereby exhausted and terminated. There remained an unpaid, unsecured balance on the indebtedness in excess of $1,200. The bank then applied plaintiff's deposit credit of $1,200, under Section 3054 of the Civil Code, toward the payment of the balance of plaintiff's indebtedness. June 23, 1943, the bank sold the boat to James Thompson for $2,000.

February 10, 1944, plaintiff brought this suit in assumpsit to recover his deposit of $1,200. The third count of the complaint charged the defendant with conversion of the funds. The defendant answered, denying the essential allegations of the complaint and pleaded plaintiff's indebtedness on the note as a counterclaim. The court adopted findings favorable to the defendant in every respect and rendered judgment to the effect that defendant is not indebted to plaintiff in any sum and that plaintiff take nothing by his cause of action. From that judgment plaintiff has appealed.

The proved facts with relation to the transaction and sale are as follows:

May 7, 1938, plaintiff executed the chattel mortgage on the boat to secure the $2,500 note. Article XVIII of the mortgage provides that, in the event of default the mortgagee may take possession of the boat "without legal process," and after specified notice may sell the same at a designated place, without the presence of the boat, and that "the mortgagee may become the purchaser at said sale." It also provides that the mortgagee shall be entitled to the costs of sale.

It appears that the boat was sold in accordance with the terms of the mortgage. There is no evidence to the contrary.

After default and demand for payment of the note April 1, 1943, the foreclosure and sale of the boat was set for April 16th of that year. After conference with John L. Childs, who represented the plaintiff, the sale was continued to April 23rd. April 14th, plaintiff executed a written power of attorney to Mr. Childs. It gave him authority, "to grant, bargain, sell, assign, transfer and set over, for such sum or price, and on such terms as to him shall seem meet, the fishing boat known as the 'Roamer,' * * *. And for me and in my name to sign and execute all necessary papers to that end. Giving and granting to my said Attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done."

The defendant then claimed and demanded payment of plaintiff's $1,200 deposit to apply on the matured debt to the bank. At the request of the bank Mr. Childs sent to plaintiff at Napa the following telegram:

"Send following telegram immediately

"'J. Wilson Manager Bank of America N.T.S.A. Crescent City c/o Bank of Bandon, Bandon, Oregon:

"'John L. Childs is authorized to sign checks Savings Withdrawals and transact all business with your bank as Attorney in fact for me. Signed Wm. F. Nelson.' * * *

"John L. Childs."

In reply to that message plaintiff sent to the bank the following telegram on April 23, 1943:

"John L. Childs is my Attorney *intact* [in fact] to dispose of the Twelve Hundred Dollars in my name in the bank at Crescent City.

"Signed W. F. Nelson."

Pursuant to that telegram Mr. Childs signed and delivered to the bank on April 23rd a check for $1,200 on plaintiff's bank account. It was signed "Wm. F. Nelson By John L. Childs his attorney-in-fact."

In May, 1943, after the sale of the boat and application of the plaintiff's bank credit of $1,200 on the balance of the indebtedness remaining after the sale, the defendant prepared and presented a written agreement to resell the boat to plaintiff on specified terms which plaintiff refused to sign.

The day before the sale occurred, the bank and John L. Childs, as plaintiff's attorney-in-fact, executed a written agreement, as we have previously stated, providing that if the defendant became the purchaser of the boat at the sale, defendant would resell and convey it to plaintiff "within thirty days from the date hereof," conditioned upon plaintiff installing the engine, which had been removed, placing the boat in "seagoing condition", paying to the bank said $1,200 deposit, and executing and delivering plaintiff's note for the additional sum of $2,000, and interest, payable in monthly installments, secured by a "First Preferred Ship Mortgage" on the boat. This agreement was not fulfilled by plaintiff. It was repudiated by him. He even denied the authority of Mr. Childs, as authorized by the telegram from him, to draw the check for $1,200 on his bank account. Thereafter, the bank sold the boat to James Thompson, on June 23, 1943, for $2,000.

After default of plaintiff's $2,500 note, the chattel mortgage appears to have been foreclosed and the boat sold pursuant to the terms of that security. The security was thereby exhausted and terminated. A balance of that indebtedness in excess of $1,200 still remained unpaid. The bank applied the $1,200 deposit of plaintiff toward the payment of that balance.

[1] The chief contention of the appellant is that John L. Childs, his attorney-in-fact, was not authorized by his power of attorney or by the telegram, to either pay to the bank the $1,200 deposit, or to enter into the agreement to repurchase the boat. While there is ample evidence to support the authority of Mr. Childs, in view of our construction of the law it seems to be unnecessary to determine that controversy. The real issue is whether the defendant owes plaintiff the $1,200 deposited in its bank. Plaintiff's matured debt on his note secured by chattel mortgage is not disputed. The question of defendant's indebtedness to plaintiff depends upon the legal right of defendant to apply plaintiff's deposit of $1,200, under Section 3054 of the Civil Code, to the payment of the balance due to the bank after the foreclosure and sale of the boat to satisfy the secured note. We are of the opinion the bank had that right regardless of the authority of plaintiff's power of attorney under which the check was drawn and the amount of the deposit paid to the defendant. The disputed authority of Childs under his power of attorney and the telegram from plaintiff may be disregarded.

Section 3054 of the Civil Code provides that:

"A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business."

In construing that section the Supreme Court said in Arnold v. San Ramon Valley Bank, 184 Cal. 632, at page 635, 194 P. 1012, at page 1013, 13 A.L.R. 320:

"Since the relation between Taylor and the bank, growing out of the deposit, was that of creditor and debtor, and the debt of Taylor was due, it follows that the bank had the right of set-off to the extent of any debt it then held against Taylor. The debt due from the bank to Taylor on account of the deposit and the note of Taylor to the bank were cross-demands. If either had sued the other upon such demand, the other could have pleaded the cross-demand as a counterclaim. Consequently, the two demands are 'deemed compensated so far as they equal each other.' [Citing authorities.]"

To the same effect is the recent case of Bromberg v. Bank of America National Trust & Savings Ass'n, 58 Cal.App.2d 1, 135 P.2d 689.

It was true, prior to the amendment of Section 438 of the Code of Civil Procedure in 1927, that while the counterclaim of the bank remained secured by mortgage, the bank was precluded from applying the customer's deposit credit to that indebtedness. McKean v. German-American Savings Bank, 118 Cal. 334, 50 P. 656; Gnarini v. Swiss American Bank, 162 Cal. 181, 121 P. 726; First National Bank v. Coplen, 39 Cal.App. 619, 179 P. 708. In the cases previously cited, upon which the appellant relies, it appears that the mortgage securities of indebtedness due to the banks had not been foreclosed, but were held by the banks at the times they sought to apply customers' deposits to their indebtedness under Section 3054 of the Civil Code. Those cases hold that such application of deposits in banks may not be made to debts which are secured by mortgages unless and until the mortgages are first foreclosed and the property sold in accordance with their terms. The clear inference is that when the securities have been exhausted by foreclosure and sale, and a balance of the indebtedness remains unpaid, a bank has the right to offset the unpaid balance of the then unsecured debt by application of the debtor's credit on deposit in the bank. In the McKean case, supra, the court said in that regard, 118 Cal. at page 339, 50 P. at page 659:

"As I read the decisions of this court, they mean that the mortgagee, whether a banking corporation or a private individual, must *first* look to the mortgaged premises *as constituting the primary fund* out of which the debt secured by the mortgage must be paid (Porter v. Muller, supra, 65 Cal. 512, 4 P. 531, and other cases cited); *that the security must be first exhausted;* if there be a deficiency, it may be docketed, but this deficiency judgment does not become a lien on any other real property, and execution will not issue upon it *until after the sale under foreclosure.*" (Italics added.)

In the present case, before this suit was commenced, the bank foreclosed the chattel mortgage given to secure the note of plaintiff and sold the boat under the terms of the mortgage for $2,300. That sum, less the costs of sale, was applied to the payment of the note, leaving an unpaid balance due to the bank in excess of $1,200. The mortgage security was thereby exhausted, as suggested by the court in the McKean case. The unpaid balance on the note was not then secured. The bank therefore properly applied plaintiff's deposit of $1,200 toward paying that unsecured balance. J. I. Case T. M. Co. v. Copren Bros., 32 Cal.App. 194, 162 P. 647, 648. The Copren Bros. case is in exact accordance with the suggestion of the Supreme Court in the previously cited cases, with respect to the application of the banker's lien on deposits of a customer to a balance due on a secured note after the mortgage has been foreclosed and the property sold.

In the present case, the appellant invokes the provisions of Section 726 of the Code of Civil Procedure, which he contends precludes the defendant from setting up the application of his bank deposit to the payment of the balance of his debt due to the bank, as a defense to this suit in assumpsit, because the note was originally secured by chattel mortgage. But the record discloses the fact that, at the time of the commencement of this suit, after the sale of the boat, that unpaid balance was not then secured by mortgage. The Copren Bros. case, supra, disposes of that contention adversely to the appellant. In that case a hearing by the Supreme Court was denied. That decision has not been overruled or modified. The facts of that case fit the situation in the present action. In that case plaintiff brought suit against the defendants for a balance due on their three promissory notes originally secured by chattel mortgage, after first selling the mortgaged property under the terms of the security. Judgment was rendered in favor of the plaintiff. The judgment was affirmed on appeal. The appellants contended plaintiff could not maintain the action for the balance due until a deficiency judgment had been first entered after foreclosure of the mortgage as distinguished from a sale of the property pursuant to the terms of the security. The Appellant Court held otherwise. The court said:

"It must be held that when this action was begun the debt was not secured by a mortgage. The property that was security for it had been sold by the plaintiff and the defendants given credit therefor. It had been sold pursuant to defendants' written consent and authorization contained in the mortgage. In making the sale the plaintiff may be said to have been acting as the defendants' agent. One object of the passage of section 726 of the Code of Civil Procedure was to compel one having a debt secured by a mortgage to exhaust his security and apply its value to the liquidation of the claim before proceeding to obtain a personal judgment as against his debtor. Many conditions may arise after a mortgage has been given rendering what was originally security for the debt valueless. In most cases, perhaps, it might be a correct statement of the law to say that the word 'secured,' as used in section 726, should be considered as used in the present tense, and that the section refers to a debt that at the time suit is brought is secured by a mortgage The adoption of the above as a general rule of construction would be subject to exceptions in individual cases. Thus, perhaps, if one having a debt secured by a mortgage should cancel it of record, without the consent of the mortgagor, it might be held he could not bring a personal action. On the other hand, if such mortgage were canceled with the consent or at the request of the mortgagor, without any intention of cancelling the indebtedness, or if the property, being personal, were all destroyed by fire, without fault of the mortgagee, in such cases the holder of the indebtedness would not be at all prevented by section 726 from bringing and maintaining a personal action for the amount due. So in this case, the property having been sold by the plaintiff acting under the written authorization of the defendants and having ceased to be security for any part of the balance due, the notes were not secured by a mortgage at the time the suit was brought, and section 726 has no application to the situation."

We think the Copren Bros. case is determinative of this appeal.

[2, 3] No formal procedure on the part of the bank is necessary to entitle it to the benefit of an offset of a customer's deposit therein, in payment of his indebtedness to the bank under Section 3054 of the Civil Code. The banker has the statutory right to apply the deposits of a customer to the payment of his matured debt to the bank, without notice. In a suit against the bank, by a customer, to recover funds deposited therein, which have been applied under Section 3054 of the Civil Code to the payment of his matured debt to the bank, it is not necessary for the bank to set up that transaction as a crosscomplaint and ask for affirmative relief. Bromberg v. Bank of America, supra; Melander v. Western National Bank, 21 Cal.App. 462, 132 P. 265. In such action, the defendant, however, may set up a counterclaim and ask for affirmative relief under Section 438 of the Code of Civil Procedure. That section was amended in 1927 by enlarging the scope of a counterclaim. Hanes v. Coffee, 212 Cal. 777, 780, 300 P. 963. Prior to the amendment of that section it contained no provision that a counterclaim could be set up as a defense when it was secured by mortgage. The amendment in 1927 specifically provides that "the right to maintain a counterclaim shall not be affected by the fact that either plaintiff's or defendant's claim is secured by mortgage or otherwise." In the case of Cohen v. Bonnell, 14 Cal. App.2d 38, 57 P.2d 1326, 1328, which was decided in 1936, plaintiff brought suit on a note for $11,000, secured by mortgage. The defendant answered, setting up a counterclaim of a note of plaintiff for $16,615, also secured by a trust deed. The defendant had previously sold personal property secured by the trust deed and applied the proceeds toward payment of the debt. There remained due to defendant, however, a secured balance amounting to $17,000, which he sought to offset against plaintiff's demand. The trial court allowed the offset and rendered judgment against plaintiff accordingly. On appeal that judgment was affirmed. The Supreme Court denied a hearing. In affirming the judgment the Appellate Court said:

"The fact that the note here in question was secured by a mortgage is immaterial under the provisions of section 438 of the Code of Civil Procedure, which permits a counterclaim to be set up whether the same is secured by mortgage or otherwise, and even in cases where the action is one to foreclose the security. Hanes v. Coffee, 212 Cal. 777, 300 P. 963."

In a suit by a customer of a bank to recover deposits therein, since the amendment of Section 438 of the Code of Civil Procedure, the bank has a right to set up as a counterclaim the customer's debt to the bank, regardless of whether it is secured by mortgage or not. In this case the defendant had a right to set up the plaintiff's debt even though it was secured by mortgage. But the mortgage had been foreclosed and the property sold pursuant to the terms of the chattel mortgage. The balance due to the bank was therefore unsecured. The security was exhausted and terminated.

The judgment is affirmed.

We concur:

ADAMS, P. J., and PEEK, J., concur.

76 Cal.App.2d 203

GUNN v. SUPERIOR COURT IN AND FOR LAKE COUNTY, et al.

Civ. 7249.

District Court of Appeal, Third District, California.

Sept. 23, 1946.

Rehearing Denied Oct. 18, 1946.

1. Appeal and error ⚿1216

Affidavits and minutes of superior court showed that superior court heard appeal from a justice court in conformity with mandate of District Court of Appeal and that appellant's efforts to present his case were not unduly curtailed or hampered as was contended by appellant.

2. Appeal and error ⚿969
Trial ⚿18

The determination of the manner in which a trial or hearing in a court is to be carried on lies within the province of the court before which the proceeding is pending, and it is not for an appellate court to say that it should have proceeded in one way or another as long as no statutory or constitutional rights of the parties were infringed.

3. Trial ⚿112

How much time parties may be allowed for argument in a trial before a court sitting without a jury, or whether they are to be allowed any at all, are matters within the discretion of the court before whom the hearing is had.

4. Appeal and error ⚿1216

Under statute providing for a penalty upon motion against inferior tribunal who without just excuse refuses or neglects to obey a peremptory mandate, a party is not entitled on such a motion to secure a review of alleged errors of the Superior Court in hearing an appeal from a Justice Court and thus obtain the benefit of two appeals when two appeals are not provided for by law. Code Civ.Proc. § 1097.

Appeal from Superior Court, Lake County; Lilburn Gibson, Judge.

Mandamus proceeding by James A. Gunn, Jr., against the Superior Court of the State of California, in and for the County of Lake, and the Honorable Benjamin C. Jones, Judge thereof, to compel the Superior Court to set aside an order dismissing a judgment entered in the justice's court and to hear the appeal. On motion to take such action and make such orders against the Superior Court of Lake County, and Judge Ben R. Ragain, judge pro tem., as may be necessary and proper, and for an order setting aside Judge Ragain's decision affirming a judgment of the justice court and to order a new hearing of the appeal, and to direct Superior Court as to what the law is in the case and what the decision should be.

Motion denied.

See, also, 166 P.2d 906.

James A. Gunn, Jr., of Kelseyville, in pro per.

Charles Kasch, of Ukiah, for respondent.

ADAMS, Presiding Justice.

On or about May 18, 1946, this court issued a writ of mandate directing the Superior Court of Lake County to set aside an order made by it dismissing an appeal by petitioner James A. Gunn, Jr., from a judgment of a justice's court, and to proceed with the trial and determination of the action on appeal.

On August 2, 1946, said James A. Gunn, Jr., filed in this court what he has designated as a notice of motion in which he asks this court to take such action and make such orders, in accordance with section 1097 of the Code of Civil Procedure, as may seem necessary and proper, against the Superior Court of Lake County, and Judge Ben R. Ragain, presiding as judge pro tem. in said court. Said notice of motion recites that a "purported" hearing of his appeal was had in said Superior Court before Judge Ragain, but that it "was not a hearing at all, but a mere pretended obedience to the peremptory Writ of Mandate" issued by this court, and was "essentially a disobedience of said Writ." The grounds of the motion as stated are that appellant was not allowed to read to the trial court an excerpt from a particular decision, or to make his argument, but was told that he did not understand the matter; that he was "shut off" and "summarily dismissed" and ruled against. Said notice of motion was accompanied by an affidavit of the movant in which he alleges in greater detail that he was not permitted to read to the court from the decision in the case upon which he relied. Also in said affidavit, in effect, he argues the merits of his appeal from the judgment of the justice's court, and asks this court to make an order setting aside Judge Ragain's decision affirming said judgment, and to order a new hearing of the appeal in "complete obedience" to its prior writ, and to direct the Superior Court as to what the law is in the case and what the decision should be.

In response to the aforesaid motion Judge Ragain filed in this court his affidavit in which he alleges that the case appealed from the justice's court, entitled James A. Gunn, Jr., v. Rosetta M. Gunn, came on regularly for hearing before him; that a question of law only was presented on said appeal, the court below having sustained a demurrer to plaintiff's complaint without leave to amend; that plaintiff was allowed ample time—approximately an hour—for presentation of his argument, after which the court concluded that the order of the lower court sustaining the demurrer should be affirmed, and so ordered. Petitioner filed a reply affidavit in which he denies that he was given sufficient time to present his case before the Superior Court, and again argues the merits of the case before it.

As above stated, Mr. Gunn bases his motion upon section 1097 of the Code of Civil Procedure, which provides: "When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board, or person, if it appear to the court that any member of such tribunal, corporation, or board, or such person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ."

[1] Passing, without deciding, the question of the propriety of this motion for the purposes for which it was made, upon the conflicting affidavits filed we cannot say that the superior court to which our prior writ of mandate was directed has refused or neglected to obey the same. On the contrary, it appears from the affidavits, and from the minutes of the superior court which were introduced in this proceeding, that the respondent superior court did hear the appeal in conformity with the mandate of this court; and we also conclude therefrom that appellant's efforts to present his case at said hearing were not unduly curtailed or hampered.

[2, 3] The determination of the manner in which a trial or hearing in a court is to be carried on lies within the province of the court before which such proceeding is pending; and it is not for an appellate court to say that it should have proceeded in one way or another as long as no statutory or constitutional rights of the parties were infringed. And how much time parties may be allowed for argument in a trial before a court sitting without a jury, or whether they are to be allowed any at all, are matters within the discretion of the court before whom the hearing is had. See Larson v. Blue & White Cab Co., 24 Cal.App.2d 576, and cases cited at page 578, 75 P.2d 612; Hallinan v. Superior Court, 74 Cal.App. 420, 426, 240 P. 788.

[4] Furthermore, section 1097, supra, furnishes no ground for a review by this court of the merits of the case before the lower court, nor can it serve as a writ of error or appeal from the judgment of that court. In Roberts v. Police Court, 185 Cal. 65, 67, 195 P. 1053, where it was sought to have an appellate court review the decision of a superior court in a case in which an appeal had been taken to said superior court from a decision in the police court, the Supreme Court said, 185 Cal. at page 67, 195 P. at page 1054, that it is "thoroughly settled that the judgment of a police court or justice's court will not be reviewed on certiorari, after appeal taken therefrom and determination of such ap-

peal in the superior court," there being no lack of jurisdiction of that court or excess thereof.

In Moyer v. Superior Court, 29 Cal.App. 2d 330, 84 P.2d 240, it was sought to review by certiorari the decision of the superior court in a case appealed to it from a police court. The court said, 29 Cal.App.2d at page 333, 84 P.2d at page 241: "The respondent court having acted within its jurisdiction in deciding the appeal thus taken by this petitioner, this writ will not lie. The petitioner is, in effect, attempting to obtain the benefit of two appeals when the same is not provided for by law. Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317; De Matei v. Superior Court, 74 Cal.App. 147, 239 P. 853; Erickson v. Municipal Court, 219 Cal. 737, 29 P.2d 192."

The court then quoted from Armantage v. Superior Court, 1 Cal.App. 130, 81 P. 1033, in which it was sought to review by certiorari a judgment of a superior court in a case appealed thereto from a judgment of a justice's court. The court there said, 1 Cal.App. at page 133, 81 P. at page 1034: "The fact is, the petitioner here, having no appeal from the decision of the superior court, is endeavoring to substitute certiorari for an appeal, and thereby have reviewed the objections made and the exceptions taken in the superior court that he is prohibited from having reviewed upon appeal. This he may not do. It has been held in every late case in our Supreme Court, where the question has been squarely raised, that certiorari goes only to the jurisdiction or power of the court to act, and can never be substituted for an appeal to review the mere errors of a judicial tribunal. Borchard v. Board of Supervisors, 144 Cal. 10, 77 P. 708; Valentine v. Police Court, 141 Cal. 615, 75 P. 336; Wittman v. Police Court, 145 Cal. 474, 78 P. 1052; Code Civ.Proc., § 1068."

The same may be said of the movant's attempt to secure on this motion a review of what he contends were errors of the superior court, and thus obtain the benefit of two appeals when same are not provided for by law.

The motion is denied.

THOMPSON and PEEK, JJ., concur.

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76 Cal.App.2d 421

HARVEY MACH. CO., Inc., v. WESTERN MECHANICS LOCAL UNION NO. 700 et al.

Civ. 15371.

District Court of Appeal, Second District, Division 2, California.

Oct. 9, 1946.

1. Trade unions ⟹8

Letters between employer and union not indicating an intention on part of employer to modify, amend, or to terminate a contract between employer and labor union, written less than 30 days prior to anniversary date of collective bargaining agreement, did not terminate contract in accordance with provisions of contract pertaining thereto.

2. Trade unions ⟹8

Collective bargaining agreement, providing that contract should remain in force for one year from date of execution and thereafter unless either party signified their desire to terminate contract by notifying other party in writing 30 days prior to anniversary date of agreement, continued in effect for a second year where employer's notice of employer's understanding that contract was to terminate on the first anniversary date was not sent 30 days prior to anniversary date, so that the contract was not subject to modification, amendment, or termination prior to second anniversary date upon 30 days written notice.

3. Contracts ⟹175(2)

In action for declaratory relief seeking interpretation of provisions in a written contract, testimony that one of the parties said in a telephone conversation that it would terminate contract on a certain date was inadmissible, since it did not tend to throw any light upon intention of parties as to terms of contract when it was executed.

* * *

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Harvey Machine Company, Incorporated, against Western Mechanics Local Union No. 700, an unincorporated association; International Union, Mine, Mill and Smelter Workers, an unincorporated association; George Knott and others for declaratory relief seeking interpretation of certain provisions in a written contract. From a judgment in favor of defendants, plaintiff appeals.

Judgment affirmed.

Hindin, Weiss & Girard, of Los Angeles, for appellant.

Katz, Gallagher & Margolis, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in an action for declaratory relief seeking interpretation of certain provisions in a written contract, plaintiff appeals.

The undisputed facts are these:

On August 17, 1944, plaintiff and defendants entered into a collective bargaining agreement which contained among others a provision reading as follows:

"Article XVII. Term of Agreement. Section 1. This agreement shall begin and remain in full force and effect for one year from date of execution, and thereafter unless either party signifies their desire to modify, amend or terminate said contract by notifying the other party in writing thirty (30) days prior to the anniversary date of agreement."

Letters passed between the parties on the following dates, April 30, 1945,[1] June 8,

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[1] The following is the letter of April 30, 1945:

"Mr. Lawrence Harvey, Vice President
"Harvey Machine Company
"6200 Avalon Blvd.
"Los Angeles 3, Calif.

"Dear Lawrence:

"I am presenting these thoughts to you on an informal basis in order to give us some point where we can begin conversations to eliminate some of the inequities that exist in our present relationship. I suggest we use the present contract as a base and then, in conversation with each other, go over the whole thing so that we can arrive at a sound conclusion. I'm also enclosing a copy of the International and Local Constitutions as you requested.

"1. I suggest some discussion on changing the preamble in order to resolve any situation that may arise later relative to shifting employees from one plant to another.

"2. I think Article 1 should be changed to definitely define the bargaining agency, and the Union shop and checkoff, as proposed in our discussions.

"3. Under Article 3, I think it should be incorporated that Union personnel should be trained in industrial relations.

"4. I suggest that Article 4 be changed as follows. Section 1—committee to consist of three members, of whom the shop chairman be one. Under Sections 2 and 3 and 4, I think the step-ups are logical, but my thought is that except in cases of emergency, grievance should go before the shop stewards committee and myself for approval before being submitted to management. I further believe that the interests of both parties will be better served if any such grievances are submitted and answered in writing.

"I suggest the removal of Sections 5 and 6, with the substitution that all unsettled grievances shall come before you and me personally for final settlement, or in the event that something should happen to either of us, that Mr. Leo Harvey would make any such designation for the Company and Mr. Reid Robinson would designate an appropriate person for the Union.

"I suggest a change in Section 8, since under this plan grievances would be held more than three days before they would be submitted.

"5. Under Article 5, I think that sections 1 and 2 should be defined and clarified. It might be more advisable to work on classification seniority rather than departmental. Competency should be retained but should be clarified also. It is my opinion that by discussing the matter of seniority we can work out a much fairer and equitable setup than we now have.

"6. I suggest that Article 14 be clarified so that both parties will understand the point at which conflict between Article 4 and Article 14 ceases and so that the Union will not infringe upon any of management's prerogatives.

"7. I suggest that Article 15, Section 4, be clarified so as to prevent as much friction as possible prior to any disciplinary action taking place.

"I suggest that when we finally work out an agreement that Reid Robinson should be a signator to the same.

"May I suggest that we get together on these ideas and see what can be worked out.

"Very truly yours,
"George Knott [s]
"Regional Coordinator"

1945,[2] June 9, 1945,[3] and August 8, 1945[4]. Each of the foregoing letters made reference to the contract between the parties.

Plaintiff in its brief contends that the trial court refused plaintiff's offer of proof that the letter of June 9, 1945, was written after a telephone conversation between the vice-president of plaintiff company and defendants' representative in which conversation plaintiff told defendants that plaintiff would definitely terminate the contract on August 17, 1945.

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[2] This is the letter of June 8, 1945:

"Mr. Lawrence Harvey, Vice President
"Harvey Machine Company, Inc.
"6200 Avalon Blvd.
"Los Angeles 3, California

"Dear Lawrence:

"For more than a period of two months now I have been trying consistently to sit down with you and arrive at some equitable agreement relative to the labor relations in the Los Angeles plant.

"For the past four or five weeks at least you have been consistently promising me that you would have a contract drawn up to present to me, which I still have not seen nor discussed, except in the most cursory fashion.

"I notified Frank Downey this week, being unable to get in touch with you, that we could not wait past Friday, June 8th. Frank called me back a day or so later and told me that he would give you that message. Since Friday, June 8 has now come and gone, I am forced to the conclusion that you have no intentions of carrying out your promises.

"Such being the case, I hereby withdraw any and all tentative proposals that were made by the Union, and I would like to inform you at this time that we are going to try to stabilize labor relations as much as possible on our side of the fence—with the full recognition, of course, that it takes two people to make an agreement. We intend to live within the scope of the agreement and to enforce each and everyone of its provisions as interpreted.

"I am extremely sorry that the attempts we have made to meet with you and arrive at a mutually satisfactory understanding have ended so abysmally, but most certainly you should realize that cooperation is a two-way street, and that you can't expect cooperation from us when you refuse to return it, either in full measure or even partially so.

"Believe me to be,
"Most truly yours,
"George Knott [s]
"Regional Coordinator"

[3] The following is the letter of June 9, 1945:

"Mr. George Knott
"Regional Coordinator
"Western Mechanics Local 700, C.I.O.
"5851 Avalon Blvd.
"Los Angeles 3, California

"Dear George:

"Since V–E Day we have experienced an increased number of cancellations and we have been advised that we are yet to receive more substantial cancellations. Our business therefore is in a very uncertain state and we do not know what jobs, or what work, or what business, if any, we may have within the coming months.

"With the whole manufacturing undergoing such a radical contemplated change as to whether we will be in business, what business we will be in, and what our mutual problems will be, it is just a practical impossibility at this time to forecast and therefore be able to make any sound continuing labor agreement.

"Very truly yours,
"Harvey Machine Co., Inc.
"Lawrence A. Harvey
"Executive Vice-President"

[4] This is the letter of August 8, 1945.

"Western Mechanics Local 700, C.I.O.
"5851 Avalon Boulevard
"Los Angeles 3, California
"Attention Mr. George Knott

"Gentlemen:

"You have heretofore on June 8, 1945 entered into negotiations in writing for a new contract at the expiration of our present labor agreement. The company assumes that your letter was sent as an official notification of the Union's desires of a modified amendment or termination of the contract when it expires on August 17, 1945.

"The company has heretofore explained that it feels that certain changes should have been made in the agreement should it be continued for any period of time beyond August 17, 1945.

"This letter is intended to confirm our understanding that the present agreement will terminate on August 17, 1945 and negotiations may be opened, looking toward the making of certain changes, in any future agreements.

"This letter will also serve as our official reconfirmation and renotification to you that the company desires to modify, amend or terminate the present contract upon its expiration date, August 17, 1945, or thirty days from the date of this letter, whichever is more acceptable to you, but in no event later than thirty days from this date. We notified you by our letter of June 9, 1945 that we could not make any agreement.

"Very truly yours,
"Harvey Machine Co., Inc.
"By: Maurice J. Hinden"

The trial court found that (1) neither party had complied with the necessary requisites for the purpose of terminating said contract prior to August 17, 1945, as provided in Article XVII, supra, (2) the collective bargaining agreement was not terminated on the 17th day of August, 1945, but should remain in full force and effect until the 17th day of August, 1946, and (3) the collective bargaining agreement was not subject to modification, amendment or termination upon thirty days' notice or other reasonable notice during the period from August 17, 1945 to August 17, 1946.

There are three questions presented for our determination which will be stated and answered hereunder seriatim:

[1] First: *Did the trial court err in holding that plaintiff had not signified in writing thirty days prior to August 17, 1945, its desire to modify, amend or terminate the contract between the parties?*

This question must be answered in the negative. There is nothing in the letters of April 30, 1945, or June 9, 1945 indicating an intention upon the part of plaintiff to modify, amend or terminate its contract with defendant. The letter of August 8, 1945, was ineffective for such purpose since it was sent to defendants less than thirty days prior to August 17, 1944. In view of the fact that the foregoing constituted all the evidence before the trial court the finding that plaintiff had not terminated the contract in accordance with the provisions of Article XVII was correct.

[2] Second: *Was the trial court correct in finding that the contract should remain in force until August 17, 1946 and that such contract was not subject to modification, amendment or termination prior to said date upon thirty days' written notice?*

This question must be answered in the affirmative. Article XVII provided that the contract should remain in force for one year from the date of execution "and thereafter unless either party signifies their desire to modify, amend or terminate said contract by notifying the other party in writing thirty (30) days prior to the anniversary date of agreement." It appears clearly that by this provision the contract was to remain in effect for successive periods of a year unless thirty days prior to the anniversary date, to wit, August 17th, either party should signify in writing its desire to modify, amend or terminate the contract. In the instant case plaintiff signified such intention by its letter of August 8, 1945 which would be effective on August 17, 1946.

[3] Third: *Did the trial court commit prejudicial error in refusing plaintiff's offer of parol evidence relative to the telephone conversation between its vice-president and defendants' representative?*

This question must be answered in the negative. Even if it be conceded that the agreement was ambiguous as to its terms the proffered evidence had no bearing upon the claimed ambiguity. The fact that one party to the agreement said that it would terminate the contract on a certain date did not tend to throw any light upon the intention of the parties as to the terms of the contract when it was executed.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

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76 Cal.App.2d 346

PLXWEVE AIRCRAFT CO. et al. v. GREENWOOD et al.

Civ. 15190.

District Court of Appeal, Second District, Division 3, California.

Oct. 4, 1946.

Trusts ⟹110

Evidence that transactions, whereby new company was organized to which was transferred assets of old company in furtherance of scheme to develop geodetic type airplane, were not unconscionable or unfair to old company or principal investor therein, and that attorney for principal investor and orginator of geodetic type airplane and the new company did not thereby secure secret profits and advantages at expense of old company or principal investor, was insufficient to establish constructive trust in favor of old company and principal investor against attorney and orginator and new company.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action for an accounting, to establish a trust, and for declaratory relief by Plxweve Aircraft Company, a corporation, and Ralph Hemphill, against Allan D. Greenwood and others. From the judgment, the plaintiffs appeal.

Affirmed.

Chas. L. Nichols and George Acret, both of Los Angeles, for appellants.

R. Bruce Murchison and Richard C. Hart, both of Los Angeles, for respondent.

DESMOND, Presiding Justice.

It was charged in the second amended complaint, upon which this case went to trial, entitled "For an accounting, to establish a trust, and for declaratory relief," that defendants Murchison and Greenwood conspired to secure through their instrumentality and while acting in a fiduciary capacity, new financing for the benefit of the defendant Plxweve Manufacturing Company "and to secure for themselves the secret profits and advantages hereinafter set forth and in the manner and by the means of the unconscionable transactions hereinafter set forth." Judgment was entered in favor of defendants Greenwood, Murchison and Plxweve Manufacturing Company, a corporation, and from this judgment the plaintiff corporation, Plxweve Aircraft Company, and Ralph Hemphill, president thereof, have appealed.

Defendant Murchison is an attorney at law and for several years prior to 1940 had enjoyed the complete confidence of his client Ralph Hemphill, organizer of several aero-nautical schools and a successful business man of large experience. In the latter part of that year, at the request of Mr. Hemphill, he incorporated Plxweve Aircraft Company and for several months thereafter continued to act as attorney for that corporation. The respondent Greenwood was the originator and developer of a new design for airplanes, sometimes referred to as the "geodetic" type. He had spent considerable time and money in attempting to develop this airplane in the vicinity of Portland, Oregon, and in the summer of 1940 had come to Los Angeles at the invitation of an engineer employed by Mr. Hemphill.

Various conversations took place between Greenwood and the employees of Hemphill, as a result of which it was agreed that a corporation would be formed to attempt the further development and completion of one or more airplanes of the design originated by Greenwood. The agreement reached with respect to the developing of the airplane was that Hemphill would furnish $30,000 cash, for which he would be entitled to receive 30,000 shares, or 60%, of the 50,000 shares of stock permitted to be issued in the new corporation. Greenwood was to transfer his interest in and to the design for a geodetic type airplane to the corporation, for which he was to receive 20,000 shares, or 40%, of the stock to be issued in the new corporation. Instead of having the 20,000 shares issued to himself, however, Greenwood distributed almost one-half thereof among persons who had assisted him financially and otherwise in Portland. Among these were Guy R. Harper, his son Richard or "Dick," and Kay Olesen. Mr. Hemphill did not take title to the entire 30,000 shares which he was to receive, but gave a certain portion of it to various employees of his and delivered 500 shares thereof to Mr. Murchison for his services in organizing and forming the Plxweve Aircraft Company. Immediately after the formation of the corporation work was undertaken to complete the development and construction of one or more of the geodetic airplanes, to be flown, proved and accepted. However, by March 15, 1941, the corporation was practically bankrupt, having expended all its available cash and being in debt for various expenses, the principal item of which amounted to approximately $15,000 due to Aero Industries Technical Institute, Incorporated, another corporation in which Hemphill owned a controlling interest. The only assets which the corporation had were its good will, its corporate name, certain engineering data concerning construction of wooden airplanes, approximately $741 worth of materials and small hand tools, and one geodetic type wooden airplane which had been completed to such an extent as to permit it to fly, but because of certain technical defects, had not been accepted by the Civil Aeronautical Authority. Mr. Murchison had purchased from Mr. Greenwood 1271 shares of the corporation, for which he paid cash at $2 per share. This was done with the consent and approval of Mr. Hemphill. After failure of the new type airplane to receive official acceptance, estimates were furnished by Mr. Bates, an engineer employed by Hemphill, which indicated that the necessary additional cost to have the plane completed and accepted would amount to $3,500. According to respondents, "appellant Ralph Hemphill emphatically and unequivocally announced that he would not put another cent into the project, and threatened to consider the whole matter closed and go to Mexico on a vacation." Efforts to obtain financing by a second issue of stock, priced at $2 per share, had not been successful, neither were efforts by Mr. Hemphill and others to raise new capital by other means.

At this juncture, Murchison, with the knowledge and consent of Mr. Hemphill, advanced approximately $2,000 over a period of several weeks to meet the payroll of the corporation. Meantime, on March 28, 1941, he addressed a letter to Mr. Guy R. Harper, who resided in Portland and was known to Mr. Hemphill as a director of the Plxweve Aircraft Company. This letter presented the facts in a light favorable to the obtaining of additional capital and was followed by other letters and long distance telephone conversations between Harper and Murchison, all relating to the same subject. Mr. Murchison discussed the matter with Mr. Hemphill and secured his approval of a plan developed by himself and Harper. This plan was outlined in a letter prepared by Murchison and submitted to Hemphill, because, as Murchison testified, he considered the latter "the whole company." It was signed by Mr. Hemphill and a postscript was added by him. It reads as follows:

"Los Angeles, California
"April 15, 1941.

"Mr. R. Bruce Murchison,

"Participant and Trustee for Parties Interested in creating subcontracting arrangements under Plxweve Aircraft Company

"620 West Olympic Boulevard,
"Los Angeles, California.

"Dear Sir:

"This will serve as my agreement relative to subcontracting operations of the Plxweve Aircraft Company in so far as I am personally affected, and in so far as my influence upon the Board of Directors is concerned in the ratification thereof.

"It is my understanding that you contemplate the organization of a company of approximately twenty or twenty-five thousand dollars, the purpose of which will be to engage in subcontracting work. It is also my understanding that it is the desire of the principals of this enterprise that the efforts toward the completion of the present Plxweve airplane be continued and maintained with the view in mind of obtaining an A. T. C. license.

"It is my understanding that you propose that Plxweve Aircraft Company, a corporation, transfer and assign all of its developments relative to the subcontracting woodwork, and assign all of its machinery and equipment and to pay therefor, and its present contract for rental of machinery and equipment, and that the subcontracting company also take on all of the employees now on the payroll, either in the engineering division or in the shop.

"That in consideration of the transfer of this development, etc., the subcontracting company will be entitled to use the name 'Plxweve Manufacturing Company' or 'Plxweve Contract Company', and in consideration thereof will undertake to continue with due diligence the efforts directed toward the completion of the Plxweve aircraft for its A. T. C. license, such aircraft being known as NX 19994, for a period of not less than three months. It is the contemplation that this work will cost between $4000.00 and $5000.00, and that in any event $5000.00 will be made available hereunder, if necessary.

"In addition to the foregoing, it is understood and agreed that as a condition to the licensing as herein above specified, the subcontracting company will pay to Plxweve Aircraft Company one-third of the net profits of the operation of the subcontracting company calculated upon ordinary and standard accounting methods, and that the advances for and on behalf of the completion of the plane shall be advances chargeable against earnings under this provision, to wit: one-third of the net income.

"It is further my understanding that you will forthwith continue the payment of payrolls and other incidental expenses pending the final organization of the subcontracting company.

"It is my further understanding that as a condition precedent to your undertaking, you desire that I as a creditor of Plxweve Aircraft Company, will accept a note from Plxweve Aircraft Company, by the terms of which the sum due me will not become due or payable for at least six months subsequent to the execution of the note and that I will as a director of Aero Industries Technical Institute, Incorporated, recommend that a note containing similar terms be accepted by Aero Industries Technical Institute, Incorporated.

"It is further my understanding that you will accept a note containing similar terms in so far as your claim against the Plxweve Aircraft Company is concerned, to the end that Plxweve Aircraft Company will have an operating period of six months, at least, prior to the time these obligations become due and payable.

"The consideration for this agreement will be the immediate payment of payrolls under Plxweve Aircraft Company and the continuance of the operations of that company toward the licensing of Plxweve Aircraft plane.

"Wishing you the best of success in this effort, I am

"Yours very truly,
"(Signed) Ralph Hemphill

"P. S. I understand your corporate setup for the subcontracting company will be a $25,000.00 paid-in capital corporation."

In the complaint it is alleged upon information and belief "that in the conception and execution of the plan embraced in said proposal and in the consummation of the transactions herein and hereinafter set forth, said defendant Murchison had, and thereafter at all times continued to have, the active aid and assistance and the counsel and support of defendant Greenwood and the other defendants herein, and each and all of the defendants aided and abetted therein as an integral part of said conspiracy." It was also alleged that pursuant to recommendations made by Murchison and because of the trust and confidence reposed in him by Hemphill, the latter signed another letter, reading as follows:

"May 5, 1941

"Mr. Bruce Murchison,

"Participant and Trustee for parties interested in creating subcontract arrangements under Plxweve Aircraft Company,

"620 West Olympic Blvd.,

"Los Angeles, California.

"Dear Sir:

"Pursuant to our discussion, I am furnishing you with this letter of confirmation which will act as a supplemental agreement to the agreement set forth in my letter addressed to you dated April 15, 1941.

"It is my understanding that the participants desire to limit the amount of money to be received by Plxweve Aircraft Company under the paragraph and agreement providing for the payment of one-third of the net profits.

"It is agreeable with me personally, and I will exert my influence as a member of the Board of Directors of Plxweve Aircraft Company to obtain the confirmation and agreement by that company that when you have distributed a total sum of $30,000 in profits under the provisions referred to that from and after such time no obligation will thereafter remain for the distribution of or participation in any of the profits in your operation.

"It is understood that this agreement will in no way alter your obligation to advance money and to proceed with the diligence in your efforts relative to the completion of the Plxweve Aircraft bearing license #NX-19994. For the purpose of verification, it is understood that any and all advance made in the completion of the airplane within the limit specified shall be credited as against earnings and as against the $30,000 provision as herein created.

"Yours very truly,
"BM:f (Signed) Ralph Hemphill"

Additional allegations refer to a special meeting of the directors of Plxweve Aircraft Company held on May 14th and continued to May 15th, at which resolutions were proposed, putting into effect the agreement covered by Mr. Hemphill's letter of April 15th, as supplemented by the letter of May 5th, and also providing for the delivery of notes to certain interested parties for obligations due them. While these resolutions are inartistically drawn and are not signed by the secretary or chairman, proof was before the court that the letters of April 15th and May 5th were read at the meeting and that the deal thereby proposed was put into effect, including (a) an assignment to the proposed new company of all subcontracting rights possessed by Plxweve Aircraft Company for the sum of $30,000 payable by the new company from one-third of its net profits, (b) a grant to the new corporation by the Plxweve Aircraft Company of the right to use the name "Plxweve" in its corporate title, "Plxweve Manufacturing Company," (c) an assignment to the new company of all right, title and interest in the good will created, the development, information, engineering and technical data relative to or connected with woodworking in aircraft subcontracting or construction, (d) the sale to the Plxweve Manufacturing Company of all machinery, hand tools and materials on hand as of May 15, 1941, at a price to be determined by an appraisal acceptable to the officers of both corporations, and (e) an attempt by the Plxweve Manufacturing Company to complete and license the geodetic type airplane, upon which the Plxweve Aircraft Company had been working for several months, and (f) an agreement to advance sufficient money for that purpose "not to exceed the total sum of $5,000." Further conditions were that Plxweve Manufacturing Company would take possession of all property and assume complete operating obligations, including employees and telephone, as of May 15, 1941; further, that Aero Industries Technical Institute, Incorporated, Ralph Hemphill, R. Bruce Murchison, Rene Olin and R. E. White would accept notes for any and all sums due them, payable not less than six months after acceptance.

The new corporation, entitled "Plxweve Manufacturing Company," was chartered on May 17, 1941, upon the application of Murchison and his collaborators, and the transfers, above mentioned, of property and personnel, were all promptly effected. Thereafter, there was expended by the new corporation in the effort to complete the geodetic type airplane a sum exceeding $5,100, but the subcontracting business which had been expected failed to materialize in any substantial amount, no profits were declared, and within a few months the new company was insolvent. The desired license for the operation of the plane was not obtained and a representative of a Minnesota corporation finally exercised an option for the purchase of all outstanding stock of Plxweve Manufacturing Company. This stock had been ordered escrowed by the corporation commissioner and all transfers under the option were approved by him. For 4250 shares of stock which had been allotted to Mr. Murchison he received $850, and Mr. Greenwood for his 4250 shares received the same amount. That sum of money appears from the record to constitute the only "profits and advantages" derived by them or either of them from the enterprise. Whether they were obtained by means of "unconscionable transactions" depended upon the view which the court took of the conduct of defendants Murchison and Greenwood and, as already indicated, that view was contrary to the one entertained by the appellants. They complain that "The trial court committed prejudicial error in finding adversely to the plaintiffs on the issues of non-disclosure, undue influence, unfair dealing and constructive fraud, because the defendants not only did not overcome the applicable presumptions of law relating to such issues by clear and satisfactory evidence, or any evidence at all, but they by their own testimony proved each of such issues in the plaintiffs' favor."

Our attention is directed to a former appeal in this case, reported in 61 Cal.App.2d 21, 141 P.2d 933, where this court, sitting in Division One, held that the trial court had erred in entering a judgment of dismissal upon sustaining a demurrer to the second amended complaint without leave to amend. In the opinion written in that case, it was stated (61 Cal.App.2d at page 23, 141 P.2d at page 934) that according to the complaint "Respondent represented to appellant Hemphill that respondent would have only a nominal interest in the new corporation; and it is alleged that appellant would not otherwise have entered into the transaction. It is also alleged that respondent 'intentionally refrained from making known, and expressly refused to make known,' the identities of the parties interested in the transactions in question. The deal to sell the assets of appellant corporation was ratified by the board of directors; and through thus gaining control of the assets, the defendants obtained secret profits and advantages in excess of $10,000, according to plaintiffs' information and belief." The opinion then continues, "Are the allegations set forth in substance above sufficient to found a cause of action to establish an involuntary trust, where a relation of trust and confidence, as between attorney and client, existed between defendant and plaintiff?" Quoting from Cooley v. Miller & Lux, 156 Cal. 510, 523, 524, 105 P. 981, the court stated: "The rule is well established that the relation of attorney and client is confidential in character, and that any contract entered into between them while that relation continues, *whereby the attorney obtains an advantage from the client,* is presumed to have been made by the client under the undue influence of the attorney." And quoting from Metropolis Trust & Sav. Bank v. Monnier, 169 Cal. 592, 147 P. 265, cited in Clark v. Millsap, 197 Cal. 765, 242 P. 918, the statement is made that "The relation of attorney and client is of a fiduciary character, and the Civil Code (section 2235) clearly provides that all transactions between a trustee and his beneficiary during the existence of the trust, *by which he obtains any advantage from his beneficiary,* 'are presumed to be entered into by the latter without sufficient consideration, and under undue influence.' This does not mean that a trustee may not deal with his beneficiary. But, if he does deal with him *in such manner as to obtain an advantage,* the trustee has the burden of showing by evidence that the transaction was fair." See, also, Sanguinetti v. Rossen, 12 Cal.App. 623, 107 P. 560.

It will be seen from these quotations and from the portions thereof which we have italicized, that a very important point affecting the relation of attorney and client is to determine whether the attorney by his action and advice gained an advantage over his client. In the instant case it was alleged at great length and repeatedly that by their conduct both Murchison and Greenwood received unfair and unconscionable secret profits and advantages. But the trial court, upon the evidence produced including correspondence between Murchison and Harper, found: "that it is true that the defendant R. Bruce Murchison, on or before the 15th day of April, 1941, advised the plaintiff Ralph Hemphill that he and Guy Harper and Richard *Olson* were among the persons to be interested and who did participate in the proposed new venture which resulted in the formation of the defendant corporation; that it is true that the defendant R. Bruce Murchison repeated said statements at all times when this matter was discussed, and the defendant R. Bruce Murchison advised the board of directors of the plaintiff Plxweve Aircraft Company at its meetings held on May 14 and May 15, 1941; that the court further finds it to be a fact that the defendant R. Bruce Murchison, at all times prior to and at meetings of May 14 and May 15, 1941, made a full and complete disclosure of all material facts then known to him with respect to the proposals and with respect to the formation of the proposed new corporation and of the persons to be interested and to participate in the new venture. The court further finds it to be true that the plaintiff Ralph Hemphill expected the defendant Allan D. Greenwood to participate in said new venture. That none of the allegations contained in any of said paragraphs is true except as specifically found to be true." The foregoing statement is distinctly contrary to the statement in the appellant's opening brief that the court made a finding that said defendants obtained advantages out of the transaction for themselves.

We note particularly in the finding just quoted the statement that Mr. Murchison made a full and complete disclosure "of all material facts" then known to him concerning the proposals, the formation of the proposed new corporation and the participants therein. This must mean that the court was of the opinion that certain matters complained of by the appellants were actually immaterial or presented no sound basis for complaint. For example Mr. Hemphill testified that Mr. Murchison told him that he intended to invest only a nominal sum in the new corporation in order to encourage the other prospective stockholders and that he was surprised later to learn that Murchison had acquired a substantial interest in the new corporation and was the president thereof. There seems to have arisen in the minds of the appellants the idea that the declaration by Murchison that he contemplated the investment of only a nominal sum of money debarred him from acquiring a substantial interest. That, of course, does not follow. Some complaint is made by the appellants that Murchison was guilty of misrepresentation in connection with the issuance to him of stock in the new corporation. Our attention is called to the fact that in the application for the permit Mr. Murchison represented that he was entitled to the shares of stock, which were actually issued to him in escrow, because of his success in bringing together the organizers of the corporation, some of whom, like Greenwood and White, intended to devote their engineering ability, and others of whom, including Harper and Olesen, agreed to buy $10,000 worth of stock. As a matter of fact, it appeared that in addition to Mr. Murchison's organizing efforts, he actually contributed to the new corporation free of rent for a period of six months the use of buildings which he erected upon a tract of land belonging to him; but it is difficult for us to see how this additional contribution by Mr. Murchison gave rise to any real grievance on the part of Mr. Hemphill or any other stockholder of the Plxweve Aircraft Company. In this connection we have in mind that Mr. Murchison was not only attorney for that corporation but was also its creditor in the amount of approximately $3,000 and was a stockholder owning 1771 shares, for a portion of which he had actually invested cash in the sum of approximately $2500. It is obvious that if Mr. Hemphill suffered any injury by reason of the transfer arranged and effected by Murchison and his collaborators, Murchison suffered proportionately. But it does not appear that anyone suffered any loss or injury by reason of the plan developed largely by Murchison.

Although now Mr. Hemphill feels that the transaction was unconscionable and unfair, he testified at a deposition taken in January of 1944 that "I feel that the price was fair and equitable to our corporation, and it was equitable to the purchasers." On other occasions he testified similarly, but at the hearing he finally testified that "The amount of money consideration I don't think was fair because I put up $30,000 in cash, and everybody got money out of the deal, and these fellows didn't take me into consideration at all. They took Harper in, with practically no money in our company, he got his stock for nothing. I was the one that put up all the money, and if there was somebody in the new deal, if it was going to be advantageous to anyone, it would have been Mr. Greenwood, and Mr. Murchison failed to divulge to me, to let me in on certain activities that did occur, but I was never so advised." As a matter of fact, Harper received his stock in the Plxweve Aircraft Company as a gift or repayment from Mr. Greenwood for assistance rendered to him while the latter was engaged in developing his geodetic aircraft in Portland; and for the stock which he received in the Plxweve

Manufacturing Company he and his son and Olesen paid $10,000 cash. If Mr. Hemphill desired to purchase stock in that corporation undoubtedly he could have done so by merely expressing his desire, but he had not the slightest interest in buying stock in a company that contemplated manufacturing or subcontracting for airplane parts of wood-plastic construction. Mr. Greenwood testified to that effect, saying that "Ray White and Curtis Bates and I went up to his home and took a bunch of blue prints that I accumulated, spread them out on the rug and he said he wasn't even interested."

It is apparent from the last quotation from Mr. Hemphill's testimony that he feels aggrieved because he was not given stock in the new corporation, but as we read the record there was no theory upon which he could acquire an interest therein except by paying cash for stock; the others to whom stock was issued contributed either cash or something of value to the corporation, and he, through lack of interest, contributed nothing. While in Murchison's letter of April 25, 1941, it appears that he and the other parties interested had agreed as to how the stock in the new corporation might be distributed, that agreement, of course, was subject to the approval of the corporation commissioner. Apparently it was considered inadvisable to anticipate such action by making any complete statement relative thereto and it is evident that the trial court took the view that this phase of the proceedings was not material.

Upon reading the transcript in its entirety and after a careful consideration of the evidence, written and oral, that was before the trial court, the salient points of this case may be summarized as follows: Upon Mr. Hemphill's decision, expressed on several occasions, not to invest additional funds in Plxweve Aircraft Company, either by purchase of stock or by advances, it fell to Mr. Murchison's lot to undertake, at Mr. Hemphill's suggestion, the securing of new capital. This he did by arranging with the Portland group to finance the plan outlined in the letters which we have quoted. An honest effort was made thereafter to conform in every particular with this plan, and while the roseate hopes of the interested parties were not accomplished, it cannot be denied that the stockholders of Plxweve Aircraft Company gained advantages from that plan, for they were relieved of the necessity of finding additional capital to be expended toward the completion of their pet project, the geodetic airplane. That burden was taken from them by the new corporation which furnished them with the decided advantage of expending more than $5,000 toward the desired end, and the plan still belongs to them, Plxweve Aircraft Company. There is nothing in the record that we can discover to indicate that Murchison or Greenwood or anyone else obtained any advantage whatever over Mr. Hemphill. The trial court was in the same position and found "it to be a fact that the contract entered in to between the plaintiff Plxweve Aircraft Company and the defendant Plxweve Manufacturing Company, as set forth and referred to in plaintiffs' second amended complaint, was fair and equitable and that no unfair advantage was obtained from the plaintiffs, or either of them, but to the contrary it was exceedingly advantageous to the plaintiffs and each and all of them."

Many points of interest and enlightenment in connection with this case may be gleaned from a perusal of excerpts from letters which passed between Murchison and Harper while the plan proposed by the latter was under consideration. These excerpts are appended in the accompanying footnote.[1] They clearly indicate first, Mr. Murchison's recognition of the obligations

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[1] Excerpt from Murchison's letter of March 28, 1941, to Harper:

"The corporate structure is a little different picture. Mr. Hemphill has advanced his $30,000.00 and expended approximately $2,000.00 over that *some*. In addition to this sum, Aero I. T. I. claims a bill of approximately $14,000.00, which upon audit will be reduced to approximately $12,000.00, and I have advanced to date $2,000.00, and intend to advance another week's payroll of approximately $350.00 for the employees now on the payroll. I have suggested to Mr. Hemphill and to Aero that we share the present payroll load equally that were due Mr. Hemphill for his financing the original company and securing advances from his other company, Aero Industries Technical Institute, Incorporated; second, his bona fide interest in working out an established system by which it was hoped and believed that success might be obtained.

A discussion of the matters complained of by the plaintiffs would not be complete without a reference to case No. 480731, entitled "Plxweve Aircraft Co., a Corporation, v. Plxweve Manufacturing Co., a Corporation," which was called to the attention of the trial court by the filing, while the instant action (Superior Court No. 480732)

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but this suggestion has been flatly rejected. * * *

"One of the reasons why the corporation is in its present condition is that after Mr. Hemphill's deal with Angel fell through, he announced that he was not going to put up any portion of the money which he had subscribed for on this second issue and advised me that it would be up to me to endeavor to obtain people who would invest in the enterprise."

Excerpt from Harper's letter of April 4, 1941, to Murchison:

"It seems to us that the wood-working contracts and the future of the plane itself are two separate problems. * * * With respect to the wood-working possibilities, it seems to us that there is an opportunity to make very substantial profits along this line. The minimum of delay and investment would be brought about by making a contract with a wood-working outfit to manufacture your requirements. If this were not possible, it would not entail a very large sum of money to secure a suitable location and install the necessary machinery. Olesen, Dick and I would be willing to contribute funds, along with you and others who may become interested in the project, for the purpose of acquiring and installing the machinery necessary, provided, of course, that suitable contracts could be secured on a basis that would return a normal operating profit. We must recognize that this is a temporary and emergency operation and fixed investment should be held to a minimum. * * * I assume from our talk that Mr. Hemphill would not wish to participate further in the management of the plane, nor to become involved in the wood-working operation. If such is the case, in order to compensate Plxweve for funds which it has paid out or obligated itself to pay for engineering data, etc., my thought would be to form a separate corporation which would in turn contract with Plxweve for the use of engineering studies, plans, etc., to be compensated for by, say, one-third of the net profits accruing from the wood-working corporation, the new corporation to retain the remaining two-thirds. Such a plan would provide Plxweve with some income to discharge its obligation to Hemphill and Aero."

Excerpt from Murchison's letter of April 9, 1941, to Harper:

"After my return to the South, I find somewhat of a difficult condition relative to Plxweve. I believe I previously advised you that for the last 30 to 45 days I have been personally advancing the necessary funds to keep the organization operating. Mr. Hemphill has taken the positive stand that he would not advance any further sum regardless of whether he lost his investment or not. This stand is taken purely because of personal reasons rather than in any way relating to the merits or demerits of the Plxweve operation.

"Of course, in considering this problem, we must also take into consideration the fact that Aero I. T. I. has already extended credit to the amount of approximately $12,000.00, which in all probability will fall back on Mr. Hemphill's shoulders in the event it is not repaid. At least that is Mr. Hemphill's present argument as to why he should not advance further sums. In addition to that sum he has advanced $2500.00 over the agreed $30,000.00. * * * I have again contacted Mr. Hemphill's office to determine his attitude, and find that it remains unchanged."

Excerpt from Harper's letter of April 11, 1941, to Murchison:

"Enclosed is my check in the amount of $1,000.00 which is contributed equally by Kay Olesen and myself. * * * It seems clear that Mr. Hemphill is a creditor of Plxweve to the extent of funds furnished by him in excess of $30,000.00, which was his contribution for the stock he received. It is equally clear that Aero is a creditor to the extent of advances made by it to Plxweve under the agreement between the parties. Undoubtedly, Aero could move against Plxweve and cause its assets to be sold in satisfaction of its debt. If this were brought about, then all the stockholders would be wiped out and Aero would have the plane, plans, engineering data, etc., pertaining to the plane. Bearing this in mind, we naturally do not care to advance funds for further engineering on was on trial, of an "amendment and supplement to the second amended complaint." In this supplement it was charged that as a part of the conspiracy engaged in by Messrs. Murchison and Greenwood the resolution of May 14, 1941, was drafted in the form in which it was presented and adopted by the Board of Directors of Plxweve Aircraft Company for the purpose ultimately of enabling the new company that was to be formed to escape liability either for the payment of a portion of net profits or otherwise. An accounting and declaratory relief was sought in that action (No. 480731), which was filed on October 2, 1942, the same date upon which the instant case (No. 480732) was filed. The defendant Plxweve Manufac-

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the ship unless it is understood that we rank as equal creditors with Mr. Hemphill and Aero. * * * we would not object to a portion of these advances going for engineering and other expenses incident to the securing of the certificate."

Excerpt from Murchison's letter of April 17, 1941, to Harper:

"This will acknowledge your letter of April 11th with the enclosed check. I appreciate the cooperation and confidence you are extending me in this matter and I feel reassured of the success of the enterprise.

"Immediately after receiving this advice, I contacted Mr. Hemphill and the Aero School in an effort to determine what their attitude would be toward the efforts contemplated and found that after a thorough discussion with Mr. Hemphill, that he was agreeable to the proposition.

"Enclosed you will find a copy of the agreement which he signed, which essentially is a preliminary agreement and which requires a Board of Directors meeting of Plxweve in order to verify. Having obtained his signature on this agreement, however, I feel certain that the balance of the arrangements can be completed without further complication.

"I have deposited the check you forwarded in the California Bank as a trust account and have drawn the first week's wages which amount to $287.03. In addition, I have advanced to Allan Greenwood the sum of $200.00. This I did for the reason that he is in a bad personal position at the moment and his assistance and participation is essential in continuance of the contemplated operations."

Excerpt from Murchison's letter of April 25, 1941, to Harper:

"I have had the pleasure of a conference with your son, Richard, and Mr. Kay Olesen, with respect to the Plxweve deal and I am writing to you for the purpose of recording my understanding of the tentative agreements and for the purpose of acquainting you with the details of our discussion.

"It has been tentatively agreed that the respective interests of the parties involved in a new corporation to be formed in accordance with the letter I hold from Mr. Hemphill would be as follows: Mr. White, Production Engineer, five per cent; Mr. Bates, Chief Engineer, ten per cent; five per cent left in the treasury for distribution to other deserving employees and sixteen per cent each to Allan Greenwood, yourself, Dick, and Kay Olesen, and sixteen per cent to myself.

"The consideration for this division would be with respect to Mr. White, a partial financial contribution, which I will work out with him, either in his advancing money for materials or the waiving of certain salaries during the preliminary steps. As to Allan Greenwood and Mr. Bates, this will be an outright contribution as security towards their continued cooperation in the enterprise. As to the interests of yourself, Dick and Kay, it is my understanding that you will advance a sum of not less than $10,000.00 over a period of 60 to 90 days, this sum to be used for the purpose of paying payrolls that become due, for the development and completion of the airplane in accordance with the terms of the letter I have referred to, for the purpose of purchasing approximately $4000.00 worth of woodworking machinery and equipment, and for the purpose of purchasing drafting boards and other supplies. That in the event it is necessary, an additional $5000.00 would be advanced only in the event it became necessary to maintain the operation for a period of six months, and our judgment still dictated that it was a good deal.

"The consideration for my stock would be the fact that I will make available to the Plxweve Company a building on property adjacent to Lockheed Air Terminal, the building to be approximately 80 by 100, and that I will furnish this building rent free for a period of six months, provided, however, that if and when the company is operating and producing sufficient revenue above salaries and other operating expense, that in that event the company will commence the payment of rent and continue thereafter during such term as they remain in possession of the building."

turing Company denied that it had entered into any written contract or agreement with the plaintiff Plxweve Aircraft Company as, indeed, it had not, for it was not in existence at the time the resolution was adopted on May 14th. But the court in its findings added: "It is likewise true that Plxweve Manufacturing Company performed certain acts in ratification and confirmation of its said agreement with the plaintiff corporation," etc. Although, as found by the court, no formal contract was signed, the Plxweve Manufacturing Company disposed of that case by filing a stipulation for judgment by which the Plxweve Aircraft Company obtained a settlement agreement in the sum of $12,500. We have found no evidence in the record of any reprehensible conduct on the part of Greenwood or Murchison in connection with case No. 480731.

Possibly, mention should be made also of action No. 483395, filed February 2, 1943, entitled "R. Bruce Murchison, Plaintiff, v. Plxweve Aircraft Co., Defendant," in which Mr. Murchison prayed judgment upon a promissory note for the sum of $2,956.13, with interest, and for attorney's fees in the amount of $600. Murchison's "Seventh, Separate and Distinct Defense and Set-Off To And against Plaintiffs' Second Amended Complaint," in the instant action (No. 480732), stated "That on or about the last day of March, 1943, the above-mentioned action [No. 483395] was consolidated for trial with the present action [No. 480732]. That this answering defendant incorporates herein by reference his complaint, and each and every allegation therein contained, with the same force and effect as though the same were set forth in full herein." Findings thereon were as follows: "Respecting the allegations contained in the seventh, separate, and distinct defense of defendant R. Bruce Murchison * * *. The court finds the allegations of said defense to be true." Shortly after judgment in the instant case was entered on December 19, 1944, the court on its own motion set case No. 483395 for further hearing on May 3, 1945, but on being advised that an appeal had been claimed in the instant case granted defendant's motion for a stay of all proceedings in case No. 483395 pending final determination of cause No. 480732. That stay is still in effect, but for the reasons hereinbefore outlined the appeal fails and we hereby order the judgment in the instant case affirmed.

SHINN and WOOD, JJ., concur.

76 Cal.App.2d 439

STAUDIGL v. HARPER.

Civ. 15199.

District Court of Appeal, Second District, Division 3, California.

Oct. 11, 1946.

1. Landlord and tenant 278½
War ⚷4

In order to state a cause of action in an unlawful detainer proceeding in a rent control area plaintiff must plead compliance with applicable provisions of the rent regulation for housing issued pursuant to Emergency Price Control Act. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

2. Landlord and tenant ⚷278½
War ⚷4

Allegation in complaint for unlawful detainer "that now and all times since November 1939, plaintiff is and has been the owner of the real property" was a sufficient allegation that plaintiff owned property prior to November 1, 1942, the effective date of maximum rent regulation for Los Angeles defense rental area, so as to authorize owner, within provision of such regulation, to bring an action for recovery of possession of premises for her immediate use and occupancy as a dwelling for herself.

3. Landlord and tenant ⚷278½
War ⚷4

Allegation in complaint for unlawful detainer "that plaintiff now seeks in good faith to recover possession of said premises for the immediate purpose of using it for her own dwelling" was a sufficient allegation of compliance with requirement of rent regulation that property owner, in order to recover possession, must seek possession in good faith for immediate personal use and occupancy as a dwelling.

4. Landlord and tenant ⚷278½
War ⚷4

To state a cause of action in unlawful detainer, complaint must show service on tenant of a notice sufficient to comply with notice requirements of federal rent regulation and to allege ownership or an enforceable right to buy or right to possession prior to effective date of such rent regulation.

5. Landlord and tenant ⚷278½
War ⚷4

Unlawful detainer actions are not prohibited by war-time federal law.

6. Landlord and tenant ⚷290(1)

The conventional relation of landlord and tenant which must be shown to exist in order that an action in unlawful detainer may be maintained is the relation created by the convention or agreement between the parties.

7. Vendor and purchaser ⚷3(4)

An "option" to purchase land is not a sale of property but is the sale of the right to purchase and merely gives optionee right of election to purchase within a limited time in the future and vests no estate in the property and the amount of consideration paid for an option does not change nature of transaction.

See Words and Phrases, Permanent Edition, for all other definitions of "Option".

8. Landlord and tenant ⚷290(1)

The fact that tenant, at time of entering into rental contract with landlord, paid a substantial consideration for an option to purchase the premises did not give tenant an interest in the premises such as would destroy the conventional relation of landlord and tenant so as to preclude a subsequent unlawful detainer action by landlord.

9. Landlord and tenant ⚷24(1), 92(3), 115(1)

Where plaintiff had a vested community property interest in premises and, as administratrix of her deceased husband's estate, had statutory authority to lease land for a year, plaintiff's execution of lease for one year with option to tenant to buy during term of lease was valid and did not create merely a month to month tenancy so as to permit exercise of option more than a year later on theory that it was exercised during continuance of month to month tenancy created at the beginning. Probate Code, § 844.

10. Landlord and tenant ⚷290(2)

Where plaintiff, regardless of whether her vested interest in one-half of rented premises was that of a tenant in common or a community property interest, had a right to possession of premises, plaintiff had right to maintain an unlawful detainer action to recover possession from tenant. Civ.Code, § 164.

11. Landlord and tenant ⚷62(1)

Where tenant recognized validity of lease from plaintiff for purpose of gaining possession of premises, tenant was estopped to deny relation of landlord and tenant in so far as it related to her actions and rights at that time.

12. Forcible entry and detainer ⚷6(2)

"Unlawful detainer" is a summary proceeding designed to provide a speedy remedy to determine the right to the possession of real property, and a plaintiff, by proceeding in unlawful detainer, does not put title in issue.

See Words and Phrases, Permanent Edition, for all other definitions of "Unlawful Detainer".

13. Landlord and tenant ⚷92(3), 288

Where tenant did nothing during term of option contained in lease to exercise it, tenant could not contend either that option was extended because landlord could not convey an indefeasible title prior to completion of administration of estate of landlord's deceased husband or that landlord's action for possession after tenant's attempted exercise of option, after term thereof had expired, should not be regarded as a summary proceeding in unlawful detainer involving only right to possession.

14. Landlord and tenant ⚷92(5)

An optionee cannot complain of an optionor's inability to make a conveyance in absence of a tender of full performance by optionee particularly where tenant's knowledge of alleged condition of title was not acquired until after notice to quit was served.

15. Trial ⚷395(1)

Finding that plaintiff was owner of property "at all time since May 12, 1940" was a sufficient finding on issue as to whether plaintiff was owner of property prior to November 2, 1942.

16. Trial ⚷395(1)

Where truth or falsity of each material allegation can be demonstrated from the findings, the law with respect to findings is complied with.

17. Landlord and tenant ⚷291(16)

In action for unlawful detainer, where court found that lessor had right to possession it was not necessary to make a finding of ownership.

18. Appeal and error ⚷1071(6)

Defendant could not complain of failure to find with reference to a particular issue where other findings indicated that if a finding had been made as to such issue it would have been adverse to defendant.

19. Trial ⚷397(4)

Court was not obligated to make a finding on a particular affirmative allegation by defendant where no evidence was introduced and no offer of proof was made with respect to such allegation.

20. Landlord and tenant ⚷278½
War ⚷4

In summary action in unlawful detainer for possession of premises it was not necessary to make a finding of ownership in plaintiff even under rent regulation involved.

21. Landlord and tenant ⚷291(13)

In summary action in unlawful detainer evidence supported finding for lessor.

22. Landlord and tenant ⚷290(5)

Where tenant attempted to exercise option to purchase about two and three quarter years after expiration of time specified in option and then only after having been served with a notice to quit, any claim tenant had against landlord under the option was a matter to be determined in an action other than landlord's summary action in unlawful detainer and could not be asserted by a cross-complaint.

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Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Unlawful detainer action by Gwen Wakeling Bell Staudigl against Helen Harper. Judgment for plaintiff and defendant appeals.

Affirmed.

Lasher B. Gallagher, of Los Angeles, for appellant.

F. Murray Keslar, of Los Angeles, for respondent.

WOOD, Justice.

Defendant appeals from the judgment entered in favor of plaintiff in this action in unlawful detainer.

The property here involved consists of a dwelling house and lot. In 1939 plaintiff and her former husband, Burgess Bell, purchased the lot and erected a house thereon which house they occupied until he died in 1940. Plaintiff was appointed administratrix of his estate and, upon her petition, the property here in question was distributed to her as community property on November 9, 1944.

On July 21, 1941, plaintiff and defendant entered into a written lease whereby plaintiff, in her individual capacity, leased the premises to defendant for a period of one year, commencing July 21, 1941 and ending July 20, 1942. The consideration was $3,000, $500 of which was paid prior to delivery of the premises for the first and last months' rent, and the balance was payable in advance monthly payments of $250. The lease provided that "if the Lessee shall hold over the said term with the consent expressed or implied, of the lessor, such holding shall be construed to be a tenancy only from month to month, and said Lessee will pay the rent monthly in advance at the rate of $——— per month." It also provided that the lessor granted to lessee an option to purchase the property for $20,000, which option was to be exercised by the lessee "on or before the expiration of this lease," and that none of the rents collected from the lease should be credited to the purchase price. An option agreement was attached to the lease which recited that, in consideration of $2,000 paid by defendant to plaintiff, the plaintiff granted defendant the exclusive right and option to purchase, "at any time during this lease," the premises in question, but only upon written notice delivered or mailed to the optionor "within the above time"; that the balance of the purchase price was $18,000; and that in the event defendant did not exercise the option "in the time and manner above provided" the payment of $2,000 should be retained by plaintiff and one-half of said amount was to be paid by plaintiff to the brokers who secured the option.

Defendant apparently went into possession of the premises immediately upon execution of the lease, and at the expiration date set forth in the lease, July 20, 1942, she had not exercised the option to purchase. However, she continued in possession, and on March 20, 1945, plaintiff caused a notice to quit the premises to be served upon defendant. Thereafter, on April 19, 1945, defendant mailed a letter to plaintiff in which she stated that she had bought the property, that the cash was available to pay the balance of the purchase price, and she was ready and willing to pay it. On April 24, 1945, plaintiff filed her complaint in unlawful detainer and defendant demurred thereto, stating that the complaint did not state facts sufficient to constitute a cause of action. The court overruled the demurrer, and defendant filed an answer.

Appellant contends that the court erred in overruling her demurrer, and asserts (1) that there is no allegation in the complaint that plaintiff owned the premises prior to the effective date of the maximum rent regulation, as required by the regulations of the Office of Price Administration, and (2) that there is no allegation in the complaint that plaintiff seeks in good faith to recover possession of the premises for immediate use and occupancy as a dwelling for herself, as required by the regulations of the Office of Price Administration.

[1] In order to state a cause of action in a proceeding of this nature, plaintiff must plead compliance with the applicable provisions of the OPA Rent Regulation for Housing, issued pursuant to the Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq. Lester v. Isaac, 63 Cal.App.2d Supp. 851, 852, 146 P.2d 524. The rent regulation (section 6(a)6) under which plaintiff pursued her remedy, prohibited the eviction of a rent-paying tenant of housing accommodations except in certain cases, one of which is that the "landlord owned, or acquired an enforceable right to buy or the right to possession of, the housing accommodations prior to the effective date of this Maximum Rent Regulation [which in the Los Angeles Defense Rental Area was November 1, 1942], and seeks in good faith to recover possession of such accommodations for immediate use and occupancy as a dwelling for himself. * * *"

[2-4] The allegations of the complaint comply with the requirements of the regulation above referred to. As to the first part of appellant's contention, that there was no allegation plaintiff owned the premises prior to the effective date of the regulation, it was stated in paragraph I of the complaint: "That now and all times since November, 1939, plaintiff is and has been the owner of the real property [with description of the property here involved] * * *." It must be concluded, if the plaintiff has owned the property *at all times* since November, 1939, that she owned it prior to November 1, 1942. Furthermore, in paragraph IV of the complaint, wherein it was alleged that plaintiff had caused to be served upon defendant a notice terminating her tenancy, it was stated "that said notice prescribed, as the ground for the proposed removal, that plaintiff owned said premises prior to November 1, 1942 * * *." Referring to the second part of appellant's contention, that there was no allegation that plaintiff sought in good faith to recover possession of the premises for immediate use and occupancy as a dwelling for herself, it was stated in paragraph III

of the complaint, "That plaintiff now seeks in good faith to recover possession of said premises for the immediate purpose of using it for her own dwelling." That allegation stated all the elements necessary in that regard to constitute a ground for recovering possession, and the language used therein was substantially the same as that used in the regulation. That allegation again appears in paragraph IV wherein the contents of the notice to quit were pleaded. A copy of the notice was attached to the complaint, and incorporated by reference. It appears, and there is no contention to the contrary, that the notice to quit complies with the regulation. In order to state a cause of action in unlawful detainer it is necessary that the complaint show the service on the tenant of a notice sufficient to comply with that regulation. Wrenn v. Sutton, 65 Cal. App.2d Supp. 823, 824, 150 P.2d 589. It is also necessary, in addition to alleging service of such notice, to allege ownership or an enforceable right to buy or the right to possession prior to November 1, 1942, and good faith in seeking the recovery for occupancy, as required by the rent regulation. As above stated, the plaintiff sufficiently pleaded compliance therewith. Appellant cites the case of Lester v. Isaac, supra, to sustain her contention. It is to be noted, however, that the Lester case was decided upon different facts, and the law of that case sustains the conclusion reached here. In the Lester case, not only was the notice which plaintiff pleaded insufficient, in that it made no mention of plaintiff's acting in *good faith,* but the court stated that there was no allegation in the complaint "of any ground for the removal of the defendant under the said O. P. A. rent regulation." [146 P.2d 525.]

[5] Appellant also contends that the trial court erred in trying and deciding the action as one in unlawful detainer. The first argument in support of said contention is that the federal statutes, and rules and regulations of the OPA prohibit the removal of any rent-paying tenant in an action in unlawful detainer. As shown by the foregoing discussion, and cases therein cited, unlawful detainer actions are not prohibited by federal law. See also Bumgarner v. Orton, 63 Cal.App.2d Supp. 841, 146 P.2d 67; Jones v. Shields, 63 Cal.App.2d Supp. 846, 146 P.2d 735; Bauer v. Neuzil, 66 Cal. App.2d Supp. 1020, 152 P.2d 47; Yoncich v. Quinn, 69 Cal.App.2d Supp. 810, 159 P.2d 708.

[6-8] Appellant further asserts, in support of said contention, that the conventional relationship of landlord and tenant was conclusively shown not to have existed for the reason (1) that plaintiff granted defendant an option to purchase the property, and (2) that the purported written lease was executed without an order of the court. In order that an action in unlawful detainer may be maintained the conventional relation of landlord and tenant must be shown to exist. The conventional relation of landlord and tenant means the relation created by convention or agreement between the parties. Francis v. West Virginia Oil Co., 174 Cal. 168, 162 P. 394. It is apparently appellant's theory that at the time the agreements were entered into she acquired an interest in the property by reason of paying a substantial cash consideration for the option to purchase, and therefore the relation of landlord and tenant was never created. An option is not a sale of property, but the sale of the right to purchase. Hicks v. Christeson, 174 Cal. 712, 716, 164 P. 395. It merely gives the optionee a right of election to purchase within a limited time in the future (Howard v. D. W. Hobson Co., 38 Cal.App. 445, 455, 176 P. 715), and vests no estate in the property. The amount of the consideration paid for an option does not have the effect of changing the nature of the transaction, nor does it impart any greater legal effect to the option. Ludy v. Zumwalt, 85 Cal.App. 119, 131, 259 P. 52.

[9-12] In support of appellant's argument that the lease was executed without an order of court, and therefore the option was exercised during the term of the lease, she asserts that without such an order plaintiff, as administratrix of her husband's estate, had authority to lease the premises upon a month to month tenancy only; that therefore appellant's tenancy under the lease was a month to month tenancy from the beginning; and that consequently

the option was exercised during the term of the lease since the month to month tenancy had not terminated when she exercised the option. The written lease entered into between the parties to this action was for the term of one year. Section 844 of the Probate Code expressly provides that an administrator may "lease real property without an order of court * * * for a term not to exceed one year, * * *." Furthermore, plaintiff had a vested interest in the property at the time she entered into the agreements of lease and option. The deed by which the property was conveyed to plaintiff and her husband, recited that it was granted to "Burgess Bell and Gwen Wakeling Bell, husband and wife." The presumption is that property is community property when acquired by a husband and wife by an instrument in which they are described as "husband and wife." Civ. Code, sec. 164. It is immaterial, however, so far as this action is concerned whether plaintiff held a vested interest in one-half of the property as community or as a tenant in common. In either case she had a right to possession of the premises. Appellant went into possession of the premises under the lease, and it appears that both parties at that time and at all times during the term of said lease treated it as a valid instrument and fully performed the conditions thereunder. At the expiration of that term, appellant held over with the consent of plaintiff. The lease, as above stated, provided that should lessee "hold over" after the term, such holding would be considered a month to month tenancy. The evidence shows that appellant continued in the undisturbed possession of the premises for a period of approximately four years, and that at all times she accepted and acknowledged plaintiff as her landlord. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the landlord-tenant relationship so long as he continues in possession under his lease. Appellant recognized the validity of the lease for the purpose of gaining possession of the premises, and she is estopped to deny the relation of landlord and tenant in so far as it related to their actions and rights at that time. San Juan G. Co. v. San Juan R., etc., Ass'n, 34 Cal.App.2d 159, 167, 93 P.2d 582. Unlawful detainer is a summary proceeding designed to provide a speedy remedy to determine the right to the possession of real property, and plaintiff by proceeding in unlawful detainer did not put her title in issue.

[13, 14] To further support her argument that this action should not be regarded as a summary proceeding involving only the right to possession of real property, appellant states in her brief that plaintiff could not have granted an indefeasible title to the premises at any time prior to the completion of administration of the estate of plaintiff's deceased husband, and she argues, in effect, that for that reason the option was extended. The question as to whether appellant's actions, subsequent to the period of one year specified in the option, constituted an exercise of the option is not before this court. However, it does not appear that appellant did any of the acts required, during the period of one year specified in the option, for the exercise thereof. An optionee is in no petition to complain of an optionor's inability to make a conveyance in the absence of a tender of full performance on the part of the optionee. In the case of Seeburg v. El Royale Corporation, 54 Cal.App.2d 1, 128 P.2d 362, plaintiff paid defendant $5,000 for an option to purchase an apartment house then owned by defendant. During the term of the option, and as a result of an action brought by a third party against defendant, a temporary injunction was issued restraining defendant from selling or otherwise disposing of the apartment house. After the expiration of the period of plaintiff's option, the injunction was dissolved and a judgment entered in favor of defendant. Plaintiff did none of the acts required by the terms of the option for an exercise thereof, although he was financially able, ready and willing to do so had it not been for the injunction. The plaintiff thereafter brought an action to rescind and recover the consideration paid, and the court held that, even though defendant was temporarily unable to convey, that it was necessary that plaintiff first do the acts required under the option to entitle him to a conveyance before he could com-

plain of defendant's inability to perform. The court therein said, 54 Cal.App.2d at page 5, 128 P.2d at page 364, "[E]ven if plaintiff had, before the injunction suit, made a binding contract of purchase and sale, he could not now complain of defendant's inability to make a conveyance without tendering full performance on his part." In the case of Bradford v. Sunset Land etc., 30 Cal.App. 87, 157 P. 20, the defendant corporation had executed in favor of plaintiff an option to purchase which provided for payment of the price by installments but contained no agreement for plaintiff to make them. Plaintiff therein paid part of the installments, and then sued to recover the amount paid claiming the option was void because it had not been approved by two-thirds of the stockholders of defendant corporation, as required for a sale or conveyance of the property. Although noncompliance with the Code section would have prevented defendant from making a valid conveyance, the court said, 30 Cal.App. at page 90, 157 P. at page 21: "Until plaintiff performed or offered to perform the covenants imposed upon him as a precedent condition to the conveyance of the property by defendant, he was in no position to complain of the want of action on the part of stockholders in giving assent to a sale and conveyance as to which, under the terms of the contract, he had lost all right. * * * [T]he contract * * * was a mere option to purchase, the exercise of which on the part of plaintiff, and paying or offering to pay the purchase price in the manner therein specified was necessary in order to place him in a position where he could, in any event complain of the failure of stockholders to signify assent." Defendant's answer states that she did not know until April 11, 1945, that plaintiff could not deliver title to the property at the time of executing the lease and option. It is to be noted that her knowledge of the alleged condition of the title was not acquired until after the notice to quit was served on March 20, 1945. It would seem from such admission of defendant that the alleged condition of plaintiff's title was not the cause of defendant's failure to exercise the option within the one-year period.

[15-17] Appellant further contends that the court erred in failing to make findings with reference to allegations of the affirmative defense pleaded by her answer. In this regard she asserts that the trial court made no finding on the issue whether plaintiff was the owner of the property prior to November 2, 1942. The court did not find in direct language that the plaintiff was the owner of the property prior to November 2, 1942, but it found that "at all times since May 12, 1940 plaintiff has been the owner of the said real property * * *," which finding shows that she was the owner prior to November 2, 1942. If the truth or falsity of each material allegation can be demonstrated from the findings, the law is complied with. Harris v. Mount Washington Co., 55 Cal.App. 144, 147, 202 P. 903. It was not necessary in this case to make a finding of such ownership, since the court found, as hereinafter shown, that plaintiff had the right to possession prior to said time.

[18, 19] Appellant also asserts that she was entitled to a finding with reference to her allegation that she was induced to enter into the lease and option by the false and fraudulent representations of plaintiff that she (plaintiff) was the owner of the property, and "was then, and would at all times covered by the terms of said Agreement be able to furnish and deliver to defendant the good and sufficient title to said premises." As above shown, the court found that plaintiff was the owner of the property at all times since May 12, 1940. The court further found that plaintiff leased the property to defendant about the 21st day of July, 1941. It must be concluded from said findings that plaintiff was the owner of the property at the time the lease was entered into. It follows that, had a finding been made as to the allegation that plaintiff fraudulently represented she was the owner it would have been adverse to defendant. A party may not complain of a failure to find upon an issue where a finding, if made, must necessarily have been adverse to him. 24 Cal.Jur. 942-949. The findings were sufficient to support the judgment. Furthermore, no evidence was introduced, and no offer of proof was made, of any fraudulent repre-

sentations of title by plaintiff. Plaintiff (respondent) and appellant both testified that the first time they met was after the lease and option had been signed by them. There was no evidence introduced of any misrepresentations on the part of the agents whose efforts resulted in the execution of the lease and option. To warrant a reversal of a judgment for a failure to find upon an issue, it must be shown by the record on appeal that evidence sufficient to support a finding for appellant in relation to such issue was introduced. 24 Cal.Jur. 947. Unless there is evidence in the record sufficient to sustain a finding in favor of a complaining party, and such finding would, if made, countervail or destroy the effect of other findings, no error can be predicated upon the failure of the trial court to make the finding. Nicolds v. Storch, 67 Cal.App. 2d 8, 19, 153 P.2d 561.

A further contention of appellant is that the court erred in refusing to permit defendant to file a cross-complaint and to amend her answer to conform to proof. As above stated, this is a summary action in unlawful detainer. A cross-complaint may not properly be filed in such an action. Lakeside Park Ass'n v. Keithly, 43 Cal.App.2d 418, 422, 110 P.2d 1055. The amendment which appellant proposed to make in her answer would, in effect, have alleged that appellant had exercised the option. It does not appear that there was proof with which the proposed amended answer would conform. If appellant claims any right against plaintiff under the option it is a matter to be determined in another action. It appears by the answer herein that appellant has an action for damages pending against plaintiff which action is based upon the transaction herein.

[20, 21] Appellant also contends that the evidence is insufficient to support the findings and judgment. She asserts that there is no evidence to support the findings (1) that the plaintiff owned the property prior to November 1, 1942, and (2) that plaintiff had been the owner at all times since May 12, 1940. This is a possessory action, and it was not necessary in this case to make a finding of ownership, even under the OPA rent regulation here involved. A finding that plaintiff had the right to possession prior to November 1, 1942, would have satisfied the requirement of that regulation. Although, under the circumstances of this case, it was not necessary to make findings of ownership, such findings were not prejudicial. The finding stated that "plaintiff owned *or acquired an enforceable right to possession* of the real property * * * prior to November 1, 1942; that it is true that at all times since May 12, 1940 plaintiff has been the owner of the said real property * * *." (Italics added.) As to the first part of that finding, namely, that plaintiff had an enforceable right to possession, there was evidence to support it. As to the second part of that finding, that plaintiff had been the owner at all times since May 12, 1940, there was proof that plaintiff held a vested interest in one-half of the property since 1939. The evidence showed that it was community property, and that plaintiff's husband died intestate. Although the probate court did not distribute the husband's interest in the community property to plaintiff until November 9, 1944, the plaintiff, immediately upon the husband's death, became the owner of the property subject to the administration proceedings in his estate. As above indicated, the option was valid even though plaintiff did not have full title to the property. If appellant had exercised the option within a year from the date of the lease, the plaintiff might have obtained full title soon thereafter by closing the administration proceedings, or she might have obtained confirmation of the sale by the court.

Appellant also asserts that there is no evidence to support the finding that, "it is true that on or about the 21st day of July, 1941 plaintiff rented the said premises to defendant by a written lease for a period of One year, to-wit, from July 21, 1941 to July 20, 1942, at a total rental of Three Thousand ($3000.00) Dollars, payable Two Hundred Fifty ($250.00) Dollars per month." The evidence supports said finding. The lease, which was introduced in evidence as plaintiff's exhibit 1, was dated July 21, 1941, and it expressly stated that the lessor "does hereby lease" the property to the lessee "for the term commencing on the day of July 21st, 1941, and ending on the day of July 20th, 1942, for the total rent or sum of Three Thousand ($3000.00) Dollars," payable monthly in advance in "equal monthly payments of Two Hundred Fifty ($250.00) Dollars." Appellant argues that the plaintiff was prohibited by law from renting the premises for a period of one year at a rental in excess of $100 per month without an order of court. Whether plaintiff proceeded according to the provisions of the Probate Code in the administration of her husband's estate is not before this court, and neither is the question of whether she should have accounted to her husband's estate to the extent of one-half of the rents collected.

[22] Appellant urges that the renewal of the tenancy upon a month to month basis, carried with it the right to exercise the option at any time before the plaintiff gave defendant notice to quit. Defendant attempted to exercise the option after she had been served with the notice to quit, and about 2¾ years after the expiration of the one year specified in the option. As stated above, if appellant has any claim against plaintiff under the option it is a matter to be determined in another action. Appellant cites the case of Spaulding v. Yovino-Young, — Cal.App.2d —, 171 P.2d 82, 83. A hearing has been granted by the Supreme Court in that case; however, it should be noted that said case is distinguishable from the present one. That action was for specific performance of an option to purchase contained in a written lease of residence property. The lease was for the period commencing March 7, 1941, and ending March 6, 1943, for a total rental of $840, payable in monthly installments of $35 per month. The lease provided that should the lessees hold over the term therein created, the tenancy should be from month to month only "and be on the same terms and conditions as herein stated." The option, contained therein, stated the conditions upon which it was to be exercised but stated no limitation upon the time within which it must be exercised. The 2-year period set forth in the lease expired March 6, 1943, but the lessees continued in possession of the property, and continued to pay rent. On October 7, 1943, they made known their election to exercise the option, and tendered payment which was refused by the lessor. The court stated that, although the lease agreement was ambiguous and uncertain, there was no extrinsic evidence before the trial court bearing on the intention of the parties as to the question of carrying over of the option into the month to month tenancy. In construing the language of the agreement, the court held that, there being no precise time fixed within which the option must be exercised, the right to exercise it was one of the "terms and conditions of the lease," and, therefore, since the lease provided that the month to month tenancy should be on the "same terms and conditions" as those stated in the lease, the right to exercise the option continued over into the month to month tenancy. In the present case, the lease provided that the term of one year ended on July 20, 1942, that the option must be exercised on or before the expiration of the lease, and that if the lessee should hold over, the tenancy would be from month to month and the lessee would "pay the rent monthly in advance." There was no provision that the month to month tenancy would be on the same terms as the lease, and the time was limited within which the option might be exercised.

Appellant's assertion that there is no evidence to support the finding that plaintiff acquired an enforceable right to possession of the property prior to November 1, 1942, cannot be sustained. The foregoing discussion shows that she acquired an enforceable right to possession in 1939.

By reason of the foregoing, it is unnecessary to discuss the other contention of appellant that the court erred in refusing her offer to prove that plaintiff had not filed a federal income tax return.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.

76 Cal.App.2d 572

PEOPLE v. IMPERIAL COUNTY.

Civ. 3439.

District Court of Appeal, Fourth District, California.

Oct. 21, 1946.

1. Licenses ⚷32(2)
Statutes ⚷225½

The provisions of Retail Sales Tax Act and Use Tax Act as to procedure for collection of such taxes, including filing of suits, take priority over general statutes dealing with filing of claims in ordinary cases, so that suit for amounts of such taxes due may be maintained without complying with requirement of Political Code as to presentation of claims. St.1933, p. 2599, as amended; St.1935, p. 1297; Pol. Code, §§ 4075, 4076.

2. Statutes ⚷109

The title of act need not contain an index or abstract of its provisions, but constitutional mandate that subject of act be expressed in title is satisfied if provisions thereof are cognate and germane to subject matter designated by title and title intelligently refers reader to subject of act and suggests field of legislation included in text. Const. art. 4, § 24.

3. Statutes ⚷121(1)

The Retail Sales Tax Act and Use Tax Act are not unconstitutional as not sufficiently expressing in their titles subjects of imposition of such taxes on governmental bodies, such as counties. St.1933, p. 2599, as amended by St.1935, p. 1256; St.1935, p. 1297; Const. art. 4, § 24.

4. Licenses ⚷15(1)

A county's sales of crushed rock and gravel to city for road purposes, of wood to poor persons, and of materials and equipment originally purchased by county for use in constructing and maintaining roads, were "retail sales", subject to sales tax, though they were casual or incidental and not made for profit. St.1933, p. 2599, as amended by St.1935, p. 1256.

See Words and Phrases, Permanent Edition, for all other definitions of "Retail Sale".

5. Licenses ⚷28

The Use Tax Act applies to county's purchases of tangible personalty, such as books for county library, as well as to such purchases by private individuals or organizations. St.1935, p. 1297.

6. Licenses ⚷7(1)

The state's imposition of sale and use taxes, which are excise taxes, on its own political subdivisions, such as counties, is not contrary to public policy as amounting to levy on public money raised by taxation. St.1933, p. 2599, as amended by St.1935, p. 1256; St.1935, p. 1297.

◆

Appeal from Superior Court, San Bernardino County; Ben R. Ragain, Judge.

Action by the People of the State of California against the County of Imperial for the amount of sales and use taxes due on certain sales and purchases of tangible personalty by defendant. Judgment for plaintiff, and defendant appeals.

Affirmed.

C. G. Halliday, Dist. Atty., and A. C. Finney, Deputy Dist. Atty., both of El Centro, for appellant.

Robert W. Kenny, Atty. Gen., and John L. Nourse and Daniel N. Stevens, Deputy Attys. Gen., for respondent.

BARNARD, Presiding Justice.

This is an action to recover amounts claimed to be due for sales and use taxes on certain sales and purchases of tangible personal property made by the defendant over a period of several years. The purchases made consisted mostly of books for the county library and the sales consisted of crushed rock and gravel sold to the city of Imperial for road purposes, of wood obtained through county operations and sold to the poor, and of materials and equipment originally purchased for use in constructing and maintaining roads and highways but which had become antiquated or no longer required for public use. The road material and the wood were sold at cost, and all proceeds were paid into the county treasury.

The first two counts of the complaint allege that during a certain period the county purchased, from persons engaged in the business of making such sales, tangible personal property for storage, use or other consumption in California; that the property so purchased was stored, used or otherwise consumed; that the county failed to make a use tax return on these purchases as required by the Use Tax Act, Stats.1935, p. 1297; that the State Board of Equalization, pursuant to the terms of this act, audited the accounts and records and determined the amounts due; and that after due notice the county has failed to pay the same or any part thereof. The third count involving the sales taxes, alleges that the county was engaged in the business of selling at retail certain tangible personal property during the period from August 1, 1933 to June 30, 1940; that the county failed to make sales tax returns on these sales; that the board has proceeded to compute the amounts due in accordance with the provisions of the Retail Sales Tax Act of 1933, as amended, Stats.1933, c. 1020, p. 2599, as amended, and that the county has failed, after due notice, to pay.

In its answer, the county admitted that it purchased the property referred to in the first two counts, and alleged that it had used the same in the exercise and performance of its governmental duties and functions. Answering the third count, the county denied that it ever engaged in the business of selling tangible personal property at retail, but admitted that during these years it had made certain sales of tangible personal property on specific dates and for certain amounts in accordance with exhibits which were attached to the answer. From this list it appears that the county made some seventy-two sales during this period, the number per year varying from six to fifteen. The respective selling prices varied from a few dollars to as high as $4600. The answer admitted the failure to file sales and use tax returns, and the failure to pay any part of the sale or use taxes claimed. The answer also alleged that the county was engaged in no business or transactions which came within the purview of the taxing statutes in question, and further alleged that both of these statutes are unconstitutional, as applied to the county, because an intention to make them so applicable is not expressed in the title of the acts. A demurrer was also filed, as to each count of the complaint, on the ground that there was a failure to allege any presentation of the claims in accordance with the requirements of sections 4075 and 4076 of the Political Code.

The plaintiff moved for judgment on the pleadings. This motion and the demurrer were heard together and submitted on briefs. The demurrer was overruled and the motion was granted. Thereafter, a judgment was entered in favor of the plaintiff in the amount sued for and the defendant has appealed.

[1] The appellant contends that the demurrer should have been sustained because the complaint failed to allege that claims had been presented as required by section 4075 of the Political Code, and that such a filing was a necessary prerequisite to the commencement of the action. The provisions of the Retail Sales Tax Act of 1933, as amended, and the Use Tax Act of 1935 are entirely inconsistent with the idea that such a suit as this may not be maintained without complying with the requirement thus relied on. Not only do these tax acts place the burden of filing returns and paying the taxes upon the taxpayer, but particular procedure is provided for the collection of such taxes, including the filing of suits. The time allowed in connection with the penalty provisions of these acts is inconsistent with the time given to the board of supervisors in which to act on claims, under the Political Code sections; and the time within which an action may be brought is approximately twice as long as that allowed in cases coming within the Political Code sections. In view of the purpose of these various statutes and of their particular provisions, it must be held that these special taxing statutes control and take priority over the general statutes dealing with the filing of claims in ordinary cases. Brill v. County of Los Angeles, 16 Cal.2d 726, 108 P.2d 443.

[2, 3] It is next contended that the Retail Sales Tax Act of 1933, as amended, and the Use Tax Act of 1935 are invalid and unconstitutional, as against the appellant, in that their subjects, to wit, the im-

position of a sales tax and use tax on governmental bodies, are not expressed in their titles. It is argued that it appears from the title of the original Retail Sales Act that the subject and purpose thereof was to impose a sales tax on retailers, meaning any private person or organization engaged in the business of making sales at retail, and that the amendment to the act, in 1935, Stats.1935, p. 1256, which made the imposition of the tax applicable to any county, completely failed to make any change in the title which would indicate the new purpose of making governmental agencies subject to the tax. It is further argued that the title to the Use Tax Act of 1935 discloses that the subject thereof was the imposition of an excise tax on persons engaged in the storage, use or other consumption in this state of tangible personal property, but that the purpose to thus tax governmental bodies is not expressed in the title. It is, therefore, argued that these acts, with respect to their application to governmental bodies, are unconstitutional under section 24 of Article IV of the Constitution, since their subjects are not expressed in their titles.

It clearly appears that the subject of the Retail Sales Tax Act is the imposition of a tax for the privilege of selling tangible personal property, and that the subject of the Use Tax Act is the imposition of an excise tax on the storage, use or other consumption in this state of tangible personal property. As said in Powers Farms v. Consolidated Irr. Dist., 19 Cal.2d 123, 119 P.2d 717, 722:

"The title of an act need not contain either an index or an abstract of its provisions. The constitutional mandate (art. IV, § 14 [24]) is satisfied if the provisions themselves are cognate and germane to the subject matter designated by the title, and if the title intelligently refers the reader to the subject to which the act applies, and suggests the field of legislation which the text includes."

And "The title of an act meets the constitutional requirements if it contains a reasonably intelligible reference to the subject to which the legislation is addressed." City of Whittier v. Dixon, 24 Cal.2d 664, 151 P.2d 5, 7, 53 A.L.R. 956. None of the persons who are to pay these taxes are mentioned in the title of either of these acts, and that matter is entirely incidental to the subject and purpose of each of the acts. The subject of each act is sufficiently expressed in its title.

[4] The appellant further contends that it is not a retailer or doing business within the meaning of the Retail Sales Tax Act. The contention thus made is exactly the same, in principle, as that considered in the recent case of Los Angeles etc. Sch. Dist. v. State Bd. Equalization, 71 Cal.App.2d 486, 163 P.2d 45. We are satisfied with the reasoning and conclusions in that case, where the pertinent authorities are considered and distinguished. It cannot be held that the sales here in question were not taxable because they were casual or incidental. Bigsby v. Johnson, 18 Cal.2d 860, 118 P.2d 289; Northwestern Pac. R. Co. v. State Bd. of Equalization, 21 Cal.2d 524, 133 P.2d 400. Nor was it necessary that these sales should be made for the purpose of making a profit. Union League Club v. Johnson, 18 Cal.2d 275, 115 P.2d 425. If the sales here in question had been made by any person or organization, other than a governmental body, it could not be held that they were not retail sales within the meaning of the act, and since the provisions of the act are expressly made applicable to a county the same result must follow.

[5] The same conclusion must be reached with respect to the applicability of the Use Tax Act to the purchases here in question. The circumstances would call for the payment of this tax had these purchases been made by a private individual or organization. West Publishing Co. v. Superior Court, 20 Cal.2d 720, 128 P.2d 777. There can be no difference here where, by the express terms of the statute, its provisions are made applicable to a county.

[6] Finally, the appellant contends that the levy by the state of a sales tax or use tax upon its own political subdivisions "amounts to a levy on public money of the organization so taxed, because not being in business, the county or other organization, in such case, has no income except money raised by taxation which, of course, is public money" and that the imposition of such

taxes is, therefore, contrary to public policy, citing People v. Doe, 36 Cal.2d 220; Smith v. City of Santa Monica, 162 Cal. 221, 121 P. 920. Those cases involved ad valorem taxes on property but it has been held that entirely different principles are applicable to sales and use taxes, which are excise taxes. Douglas Aircraft Co. Inc. v. Johnson, 13 Cal.2d 545, 90 P.2d 572; California Inst. of Technology v. Johnson, 55 Cal.App. 2d 856, 132 P.2d 61.

For the reasons given, the judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

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76 Cal.App.2d 490

FINE v. FINE.

Civ. 15330.

District Court of Appeal, Second District,
Division 3, California.

Oct. 15, 1946.

Hearing Denied Dec. 12, 1946.

1. Appeal and error ⇨946

"Abuse of discretion" exists within rule relating to reversal of discretionary orders for abuse of discretion when it plainly appears that action of trial court effects an injustice.

See Words and Phrases, Permanent Edition, for all other definitions of "Abuse of Discretion".

2. Divorce ⇨245(2)

Where divorced wife had not been employed and had been devoting her time to care of their minor daughter who was a semiinvalid, and husband's net monthly income in 1945 was $1,500, portion of order fixing allowance to wife for her support at $30 per month was so unreasonable as to constitute an abuse of discretion.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Action by Florence Fine against Robert Fine for divorce. From an order modifying a former order for alimony, plaintiff appeals.

Reversed.

Benjamin J. Goodman and Lawrence Berger, both of Los Angeles, for appellant.

Werner O. Graf, of Los Angeles, for respondent.

DESMOND, Presiding Justice.

The only question involved on this appeal is whether the trial court was guilty of an abuse of discretion in the order which he made modifying a former order for alimony. By the terms of an interlocutory decree entered in favor of the plaintiff, signed on May 26, 1938, she was granted a divorce from her husband, who was ordered to pay through the court trustee as permanent alimony the sum of $35 per week for the support of plaintiff and her minor child. Three months later, on August 22, 1938, the order was modified requiring the defendant to pay the plaintiff a total of $100 per month, of which $20 was to be applied on arrearage and $80 to constitute the current alimony payment. Approximately three months later, on November 17, 1938, the former order was modified by requiring defendant to pay to the plaintiff $50 per month for a period of six months, then the former order to be resumed. The record indicates that for the next several years there was no resumption of $80 payments and some difficulty was experienced in collecting $50 per month.

Finally, an order was issued on September 7, 1945, calling upon the defendant to show cause why the order of November 17, 1938, should not be modified "and further, different or additional orders made as requested in plaintiff's affidavit." The affidavit recited "That since said Order was made the conditions and circumstances surrounding the parties, and upon which said Order was based, have materially changed, in this: * * * That defendant is now paying to plaintiff for her maintenance and support, and for the support and maintenance of the minor child of the parties hereto, to wit, Marilyn Fine, the sum of Fifty Dollars ($50) per month, and also

Five Dollars ($5) per month on arrears for support and maintenance upon which there is a balance now due of One Hundred Ninety-five Dollars ($195). That since said order was made, defendant has established a lucrative and successful practice in his profession of dentistry, and now has a large office located at 241 East Queen Street, Inglewood, California. That said defendant employs two nurses, besides his wife who assists him in his practice. That he is very busy and his full business time is occupied in treating patients. That your affiant is informed and believes, and basing her statement on that ground alleges that said defendant has an income of approximately Thirty Thousand Dollars ($30,000) per year. That your affiant's conditions and circumstances and those of the minor child of the parties have also changed in that the minor child is constantly under the attention of expert physicians to treat her for a very serious ailment, to wit, hypoglycinea. That said minor child is also suffering from bronchial asthma. That your affiant [has] for years past, [has been] and still is, paying approximately $50 to $60 per month for doctors' bills for said minor child. That said child has been under care and treatment by the following physicians and surgeons: Dr. Adelbert Frisch and Dr. John M. Askey. That your affiant has also had to pay and expend moneys for medicines, sundries, and X-rays for said child. That said minor child is now attending the University of California of Los Angeles, and the cost of attending said University is not within the means of your affiant and is within the means of the defendant. That the matriculation fee and books are $75 per semester at said University. That your affiant has been living with and dependent upon friends and relatives for her maintenance and support and the maintenance and support of the minor child, and that $50 per month is inadequate to maintain and support your affiant and the minor child under present living conditions. That the cost of food, clothing, and shelter has considerably increased since the date that the original Order was made, and there has been a corresponding increase in income of the defendant."

Based upon the conditions recited a request was made that the former order be modified by a new order "as follows, to-wit: That defendant be ordered to pay for the maintenance and support of plaintiff and the minor child of the parties hereto, the sum of Four Hundred Dollars ($400) per month. That defendant be ordered to pay forthwith the arrearage due in the sum of One Hundred Ninety-five Dollars ($195). That the defendant be ordered to pay to the plaintiff as and for attorney's fees for instituting and prosecuting this Order to Show Cause, the sum of One Hundred Fifty Dollars ($150) for attorney's fees and Fifteen Dollars ($15) additional for court costs."

The trial judge's reaction to the request for an increased allowance appears in the minute order of October 23, 1945, reading as follows: "Modification granted; defendant ordered to pay plaintiff for the support of minor child, through John M. Zuck, Court Trustee, the sum of $100.00 per month, payable one-half on the 1st and 15th of each month, commencing November 1, 1945 and continuing until the further order of the court or until child reaches the age of 21 years; defendant ordered to pay plaintiff for support of plaintiff the sum of $30.00 per month, payable through the Court Trustee, payable one-half on the 1st and 15th of each month, commencing November 1, 1945 and continuing until the further order of the Court. Defendant is further ordered to pay, direct to plaintiff's attorney forthwith, the sum of $100.00 attorney fees and $15.00 costs." Since the minor child was to reach her majority in May of 1946, the award for her support, $100 per month, would and did expire not more than six or seven months later. Upon cross-examination of Dr. Fine, it developed that he had not seen her for at least six years; that previously she was subject to bronchial spells and that he had attempted to contact her about her physical condition "[W]hen I was at my other office and the first thing she did, when she did keep her appointment, the first thing was she wanted a formal dress and she didn't give a darn how I felt." Possibly this offense or error in judgment on the part of his 14 year old daughter so alienated the defendant that he decided not to see her for the ensuing six years.

The evidence produced at the hearing indicated that there had been a decided change in the circumstances of the parties from the days of 1938. Certain of these changes are detailed in respondent's summary of a portion of the evidence, reading as follows: "After the divorce in 1938 respondent slept in his business office, and had no money. He remarried in May of 1942. At that time he had no money at all. He had only one dental chair and no practice. His second wife owned a home in San Fernando, in the San Fernando Valley and had about $1,500.00 cash. The house was sold for $7,500.00. Appellant then opened an office in Inglewood. His second wife bought the equipment and chairs and paid up his old bills, and worked as his assistant ten hours a day. Up until the end of 1943, appellant had never earned in excess of $2,500.00 per year. After his present wife took charge of his office in 1944 and kept the books and the accounts the business increased and for the past two years appellant has been earning a substantial amount from his business." The "present wife" had been named as corespondent in the divorce action. The court took testimony concerning the earnings of the defendant during the period from January to August, inclusive, of 1945, and it appeared therefrom that his net income averaged over $1,500 per month. It also appeared that he employed two nurses or dental assistants and that his wife kept his books at a salary of $200 per month.

The petitioner contends that error occurred (1) when, without any application being made therefor by the defendant, the trial judge reduced the amount of plaintiff's alimony; (2) that the court abused its discretion in modifying a previous order and awarding the plaintiff $30 per month when it was shown by defendant's own admissions that he had a net income of $1,500 per month; (3) that the trial judge was also guilty of an abuse of discretion when he awarded a total sum of $130 per month for the support of plaintiff and her minor daughter, when the court knew that the minor daughter would attain her majority within approximately six months thereafter "thereby resulting in a total award to the plaintiff of $30.00 per month" etc.

The reduction in plaintiff's allowance was not made pursuant to any application therefor upon the part of defendant, either by motion or by request made at the hearing. When the hearing opened, it was stipulated that plaintiff's application for an increased allowance and her application for attorney's fees on the order to show cause might be heard together. When the hearing was closed the court stated: "The matter will be submitted as to the motion to increase and also the motion for attorney's fees." The order of modification was made without further hearing. We find it unnecessary to decide whether the court of its own motion could properly make an order materially reducing the amount of the previous order.

The claim that the trial court in exercising its power abused its discretion makes it incumbent upon us to consider carefully all the pertinent circumstances. We have already indicated that a wide range in the matter of allowances was covered in the period 1938 to 1945. The first allowance of $35 per week, made when the divorce was granted and when the defendant was a struggling young dentist, was at the rate of $5 per day or $150 per month for the support of his wife and child. In the ensuing six months it was twice reduced, the second order providing for a return after six months to $80 per month, about one-half of the first award. But the order of resumption was ignored and defendant never paid more than $50 per month and was $195 in arrears on those payments when finally in 1945 the plaintiff applied for an increase. While the court ordered immediate payment of the arrearage, it saw fit, notwithstanding the great increase in defendant's earning power, to reduce plaintiff's allowance to the low point of $1 per day. This order was made although the undisputed evidence was that the plaintiff had had an operation for goiter in 1930, suffered from thyroid trouble, had been receiving medical treatment for the past five years, had not been employed, had been devoting her time to the care of her daughter, had no property or income of her own, and had been for years dependent upon voluntary contributions by her relatives for her support. Plaintiff testified that she has been supported by contributions of several hundred dollars a month from her sister and has received food and other material assistance from her mother but that the sums advanced to her by her sister have been taken from a trust fund established for the benefit of the sister's son, who will have the legal right to demand and receive for himself moneys that have heretofore been diverted to plaintiff's use. The uncontradicted evidence was that the daughter's condition requires her to be under the constant care of physicians and at a cost of more than $55 per month. Defendant endeavored to refute the evidence as to his daughter's ill health by testimony that she looked all right six years before the hearing.

The reasons why the court ordered defendant to pay $30 per month for plaintiff's support are to us inscrutable. The small amount was not fixed because it was adequate for plaintiff's needs nor because defendant could not pay more without financial discomfort. Plaintiff was either entitled to a reasonable amount for her support under the circumstances, or to nothing. There was no evidence that she was able to support herself and there was undisputed evidence that the daughter's physical condition required daily care and attention. It could scarcely be that the court expected plaintiff to become self-supporting under these circumstances, aided by a pittance of $30 per month. If the bounty of plaintiff's relatives furnished a legal ground for excusing defendant from contributing to plaintiff's support, he should not have been required to contribute anything. Perhaps the trial judge was of the opinion that defendant's payments should be reduced to a nominal amount, so long as plaintiff's relatives were willing to carry the burden of her support. But the legal responsibility rests upon the defendant to provide plaintiff with a reasonable amount for her support under the admitted circumstances. Plaintiff is caring for the semi-invalid daughter of the parties and there is no legal or moral justification for lifting the responsibility of the defendant under these circumstances from his own shoulders and placing it upon the shoulders of plaintiff's relatives.

[1] In determining the question as to whether an abuse of discretion occurred in this case, we have in mind the language employed in Clavey v. Lord, 1891, 87 Cal. 413, 25 P. 493, where the court said (87 Cal. at page 419, 25 P. at page 495): "The only limitation that the law has placed upon the exercise of discretionary judicial power is that it must not be abused. While it may be difficult to define exactly what is meant by abuse of judicial discretion, and whatever it may imply as to the disposition and motives of the judge, it is fairly deducible from the cases that one of its essential attributes is that it must plainly appear to effect injustice." See, also, Hale v. Hale, 1935, 6 Cal.App.2d 661, 663, 45 P. 2d 246.

[2] Under the circumstances of this case and without questioning the good intentions or impugning the motives of the learned trial judge, it appears from the record that the portion of the order fixing the allowance to plaintiff for her own support at a mere $30 per month is so unreasonable as to constitute an abuse of discretion. Therefore, that portion of the order is reversed.

SHINN, J., and KINCAID, J., pro tem., concur.

76 Cal.App.2d 452

In re WACHOLDER'S ESTATE.

BOTSFORD v. MacINTOSH.

Civ. 15217.

District Court of Appeal, Second District, Division 3, California.

Oct. 11, 1946.

1. Pleading 🔑367(2, 6)

An executor's demurrer to petition for his removal on general grounds and special ground that petition was uncertain as not showing manner of executor's alleged waste or mismanagement of property of state, wrongful neglect thereof or neglect to perform any act as executor, should have been treated as request to make such charges specific and granted.

2. Pleading 🔑367(5)

One whose objections to executor's account did not challenge accuracy of any item of executor's receipts or disbursements should have been required to make objections specific.

3. Executors and administrators 🔑35(19)

The superior court's order removing executor on grounds of his waste and mismanagement of property of testator's estate and wrongful neglect thereof should be sustained on appeal, unless there is no evidence of executor's unfitness or breach of duty.

4. Executors and administrators 🔑35(1)

The Superior Court exercises broad discretion in matter of removing executor of testator's estate.

5. Executors and administrators 🔑35(1)

While courts owe duty to protect carefully the interests of decedents' estates, an administrator should not be removed except for good and sufficient cause.

6. Executors and administrators 🔑35(19)

An executor, not objecting to superior court's general findings or requesting special findings in proceeding for executor's removal on grounds of waste, mismanagement or neglect, must be deemed to have waived objection to absence of findings as to specific acts of waste, mismanagement or neglect. Code Civ.Proc. § 634.

7. Executors and administrators 🔑35(16)

The superior court's general findings that executor wasted, mismanaged and wrongfully neglected testator's estate and that his account current and supplement thereto did not reflect estate's true condition were sufficient to support order revoking executor's letters testamentary. Probate Code, § 521.

8. Executors and administrators 🔑35(15)

On petition to revoke executor's letters testamentary, evidence did not show that executor had interest adverse to testator's estate in corporation, stock of which was owned by estate, or any interest except to wind up corporation's affairs to best advantage of its creditors and estate.

9. Executors and administrators 🔑35(4, 8)

An executor's refused request for court's approval of sale of furniture, held by him in warehouse for distribution to legatee, and removal of such furniture to warehouse of one who offered to purchase it and paid storage charges, did not justify executor's removal, in absence of evidence that estate was in condition to allow distribution of furniture or that it was lost, injured or destroyed or not safely stored.

10. Executors and administrators 🔑35(15)

In proceeding for removal of executor, evidence was insufficient to show that he was not entitled to credit, taken on his first account previously approved by court, for price at which he transferred certain accounts and items of personalty to a corporation, stock of which was owned by estate, in part payment of estate's indebtedness to such corporation for goods purchased therefrom by testator.

11. Executors and administrators 🔑35(10)

In proceeding for settlement of executor's second account current and supplement thereto, superior court erred in removing executor on contestant's petition and appointing special administratrix to sue executor, if necessary, for amount claimed to be due estate from him, as matters of controversy between him and estate were exclusively for determination by court in probate on settlement of his accounts and his removal could not shift such matters from probate to general jurisdiction of court.

12. Executors and administrators ⚿35(15)

While court owes duty to remove executor or administrator, whose unfitness has been proved, such trustee has right to full acquittance of charges impugning his integrity or competence, which are not established by clear and satisfactory evidence.

WOOD, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

In the matter of the estate of Joel Wacholder, deceased. From an order denying the petition of Frederick L. Botsford, executor of the estate, for instructions as to disposition of personal property, denying settlement of his second account current and supplement thereto, contested by Ruby B. MacIntosh, denying reduction of the amount of the executor's bond, and removing him as executor on contestant's petition, the executor appeals.

Reversed as to the executor's removal and reduction of his bond, and appeal from portions of order denying petition for instructions and deferring action on the executor's accounts dismissed.

Frederick L. Botsford and Samuel M. Garroway, both of Los Angeles, for appellant.

Arthur E. Schifferman and L. M. Phillips, both of Los Angeles, for respondent.

SHINN, Justice.

This is an appeal by an executor from an order (1) denying his petition for instructions regarding the disposition of personal property; (2) refusing to settle his second account current and supplement thereto; (3) refusing to reduce his bond from $20,000 to $5,000, and (4) removing him as executor.

Appellant is an attorney at law. He was named in the will of Joel Wacholder as one of two executors and was appointed sole executor on the 1st day of March, 1938. The co-executor, Mr. MacIntosh, declined appointment, and died in November, 1939. The estate was originally appraised at $37,336.97. Appellant's first account current was filed and was duly approved December 21, 1942. The assets shown in the inventory were accounted for and the estate carried into the next accounting period was of the appraised value of $8,481.15, consisting of a lot in Clear Lake Highlands, Lake County, appraised at $5; household furniture and furnishings appraised at $1,000; 250 shares of capital stock of Wacholder Glass and Sales Company, appraised at $3,405; good will and trade name of Argonaut Brokerage Company, appraised at $100; a lot and an interest in another lot in Los Angeles County; some jewelry, and miscellaneous articles of personal property of small value. By the terms of the will the household furniture was bequeathed to respondent, Ruby B. MacIntosh. It was in storage at the time of Mr. Wacholder's death and had remained there. In July, 1944, the executor reported a sale of it to one Wexler for $850 and asked for confirmation of the sale, which was opposed and was denied by the court, and the executor thereupon filed his petition for instructions as to what to do with the property. It was shown by his petition that the estate was still indebted in the amount of $603 for storage of the furniture, and for costs and expenses of administration in an amount exceeding $1,000. Ruby B. MacIntosh thereupon filed a petition for removal of the executor, upon the grounds that he had filed no account since February 13, 1942, and "That said Frederick L. Botsford has wasted and mismanaged and is continuing to waste and mismanage the property of said estate, has wrongfully neglected said estate, and has long neglected to perform any act as Executor." Appellant demurred to the petition for removal upon general grounds, and upon the special ground that it was uncertain, in that it could not be ascertained "in what manner or how the said Frederick L. Botsford has wasted or mismanaged, or is continuing to waste or mismanage the property of the above-entitled estate, or how or in what manner the said Frederick

L. Botsford has wrongfully neglected said estate or has long neglected to perform any act as executor or otherwise." Appellant also filed an answer to the petition, but in the meantime had filed his second account current. To this account Ruby B. MacIntosh filed objections upon the following grounds: that said account failed to balance; that an amount shown as having been advanced to the estate by the executor in the sum of $502.89 was not itemized; that no vouchers had been filed; that no dates of receipts or payments appeared in the account, and that the liability of the estate for storage charges of the furniture was not shown. Appellant's request in his account for the reduction of his bond was objected to upon the ground "that the executor's actions herein are presently under objection."

[1, 2] The demurrer to the petition for removal was overruled, but we do not understand why for it should have been treated as a request that the charges be made specific and should have been granted. Appellant was entitled to have the charges made specific; general charges of waste and mismanagement would be about as difficult to meet as general charges of fraud. Also, the court was entitled to have the issues clearly defined before entering upon a trial. The objections to the account did not challenge the accuracy of any item of the receipts or disbursements. Respondent should have been required to make her objections specific. Estate of More, 121 Cal. 635, 54 P. 148; Estate of Sylvar, 1 Cal.App. 35, 81 P. 663. The several matters were heard together. The trial commenced without the definition of issues as to any acts of alleged waste, mismanagement or neglect upon appellant's part, or as to any improper charge or credit in his account which respondent expected to prove. The trial ended in all the uncertainty with which it started and without the determination of any specific fact upon the petition for removal or the objections to the account.

Upon the issue of dereliction of duty, the court made a general finding that it was true that the executor had wasted, mismanaged and wrongfully neglected said estate. As to the contest over the account, the finding was, "That said account current of said executor and the supplement thereto, do not reflect the true condition of said estate." Nevertheless, petitioner's letters were revoked and he was removed as executor. After the receipt of extensive evidence, action on the account and supplementary account which had been filed was deferred indefinitely.

The reporter's transcript of the hearings shows that respondent, Ruby B. MacIntosh, was no more prepared to prove acts of malfeasance or misfeasance on the part of the executor, or errors in his account, than she was prepared to allege them. We have read and reread the transcript and the generalities of the brief of respondent and have been unable to find in the record any evidence of waste, mismanagement or neglect in the performance of appellant's duties, or any evidence which would have supported a finding that he should have charged himself with more or credited himself with less than was shown by his account. This is not to say that appellant's administration was proved to have been free of any act of waste, mismanagement or neglect, but that there was insufficient evidence to support charges of malfeasance or misfeasance. So far as the accounts before the court were concerned, there was no evidence to question their correctness. As will be pointed out, respondent confined her efforts to an attack upon appellant's first account, which had been approved in 1942. There has been no trial and determination as to the correctness of the current accounts.

[3-5] In the matter of appellant's removal as executor, the order should, of course, be sustained unless there is an entire absence of evidence of unfitness or breach of duty on the part of appellant. The trial court exercises a broad discretion in such matters (In re Bell's Estate, 135 Cal. 194, 67 P. 123; Estate of Healy, 137 Cal. 474, 70 P. 455; Estate of Newell, 18 Cal.App. 258, 122 P. 1099), but, as the court stated in In re Welch, 86 Cal. 179, at 183, 24 P. 943, at 944: "While it is the duty of the courts to protect, carefully, the interests of estates, the rights of those who are appointed to take charge of and manage them should not be overlooked;

and an administrator should not be removed except for good and sufficient cause." See also Estate of Chadbourne, 15 Cal.App. 363, 114 P. 1012.

[6, 7] The appeal involves little in addition to an examination of the record for evidence of waste, mismanagement or neglect on the part of appellant. Although the court made only general findings, it does not appear that appellant objected to them or requested special findings, as he had the right to do under section 634 of the Code of Civil Procedure, and he must be deemed to have waived the objection that there were no findings as to specific acts of waste, mismanagement or neglect. Del Ruth v. Del Ruth, 75 Cal.App.2d 638, 171 P.2d 34. The findings as made were sufficient to support an order revoking appellant's letters testamentary. Section 521, Probate Code. However, the absence of special findings has imposed upon us the necessity of making a careful study of the record to discover the grounds which the court considered sufficient and other grounds, if any, for appellant's removal. As will appear hereinafter, the court announced four reasons for revocation of the letters: (1) that appellant had an interest in Wacholder Glass and Sales Corporation, the stock of which was owned by the estate, which was adverse to the estate; (2) that appellant has been guilty of some misconduct in connection with the storage and proposed sale of the household furniture; (3) that in the settlement of his first account, appellant had taken excessive credits and that the order settling that account was erroneous, and (4) that it would be necessary to revoke appellant's letters and appoint an administrator to bring suit against appellant for any sums which he might owe the estate.

[8] The theory of adverse interest was evolved from evidence as to the winding up of the corporation shortly after Mr. Wacholder's death. Prior to his death in 1938, he had been a dealer in machinery and equipment, new and second-hand, the nature of which does not clearly appear. The business was incorporated as Wacholder Glass and Sales Corporation and Wacholder at the time of his death was the sole stockholder. Due to illness for two years preceding his death, he had entrusted the entire management of the corporation to Mr. MacIntosh, husband of respondent, who managed it to the time of his own death in 1939. Appellant, as executor, then became active in the management of the business, was made vice president, Mrs. MacIntosh became secretary, and they jointly signed checks on the corporation's bank account. After the death of MacIntosh, no one remained who could carry on the business and it proceeded into liquidation. One paid employee was retained, Mrs. MacIntosh devoted much time to the business, as did also a Miss Reid, who was a creditor to the extent of some $5,500 which she had loaned to the corporation upon notes, one, if not both of which, was guaranteed by Wacholder and secured by 250 of his 500 shares of stock. The obligations of the corporation were gradually reduced, and finally its remaining assets were sold for $1,200, from which some remaining debts were paid, leaving a balance of $500. Pursuant to agreement between the interested parties, this sum was divided, $400 to Miss Reid and $100 to Mrs. MacIntosh. During the period in question, Mrs. MacIntosh was represented by the late Marshall Taylor of the firm of O'Melveny, Tuller & Myers, and Miss Reid by Mr. Plumb of the firm of Overton, Lyman & Plumb. All this occurred long prior to the filing and approval of appellant's first account as executor, at which time the corporation was without assets and its stock without value. In the instant proceedings, respondent was permitted to inquire into the matter of the winding up of the corporation, upon the insistence of her counsel that facts would be developed which would prove appellant's unfitness to act longer as executor. It was then shown that in 1938 the corporation was indebted to Mr. MacIntosh in some amount between $2,500 and $3,500, part of which was evidenced by checks which had not been paid. MacIntosh had the control and management of the business and he and appellant signed company checks. It was arranged that $1,750 would be paid by the corporation for the account of MacIntosh and would be credited upon the debt due him. Checks were drawn for this

amount, payable to appellant, signed by appellant and MacIntosh, the latter agreeing to loan the money to appellant. After the death of Mr. MacIntosh, an agreement was entered into under the direction of Mrs. MacIntosh's attorney, by which the corporation acknowledged its indebtedness to Mrs. MacIntosh in the amount of $1,000, the claim of the MacIntosh estate against the corporation was cancelled, and appellant assumed an indebtedness to the MacIntosh estate in the sum of $1,750. This agreement was approved by the court in the estate of MacIntosh and appellant subsequently paid the $1,750 in full. This transaction with the corporation, as we say, took place in 1938. Mrs. MacIntosh was satisfied with it at that time and did not later question it until, in the instant proceeding, appellant was questioned about it. He gave a full explanation of the seven-year-old transaction and there was no evidence that he had not acted honestly and in good faith. The $1,750 incident was urged by respondent, and appears to have been viewed by the court, as a sufficient reason for appellant's removal as executor. Although the transaction was seven years old, the money appellant had borrowed from Mr. MacIntosh had been paid in full, the corporation had long since become defunct, and appellant had continued to act as executor without protest from respondent, it was held that he had some sort of interest in the corporation which was adverse to the estate. At the conclusion of the first hearing the court stated: "I don't know whether the Objector, or anybody interested in this estate is ever going to make anything out of it, but it certainly cannot be tested by an executor who has a conflicting interest. These matters have to be determined by the acid test of *adverse interest,* and for instance, I think this furniture alone is enough to remove the executor. * * * I think the accounts are wrong. I wouldn't want to accept them, *because I think it has been clearly disclosed that the executor had an adverse interest in this company.* I haven't gone far enough to reach a conclusion about it, except for the *adverse interest.* The prognosis of getting anything out of it is poor, *but it can never be tested unless some administrator is appointed who will, if necessary, sue the executor.* In the matter of the petition to remove the executor, his powers are suspended, and letters are revoked, and of course, that is all I can do now, until somebody applies to have themselves appointed as administrator." [Emphasis ours.] So far as Mrs. MacIntosh was concerned, she was interested in the liquidation of the corporation only as a creditor of the corporation and as a legatee of the furniture. She was secretary of the corporation during the liquidation and agreed to the final sale of assets and distribution of the proceeds. The acts of appellant in liquidating the corporation as executor and for the benefit of the estate, as sole stockholder, were subject to review in the settlement of his first account. Technically, he had acted as an officer of the corporation, but being also, as executor, the sole stockholder, he would have been responsible to the estate for any breach of duty in protecting the interests of the estate. Mrs. MacIntosh, through her attorney, had actual notice of the filing of the first account and filed no objections thereto. Four other legatees and devisees who had been left stock in the corporation did file specific objections, and Margaret Reid, a creditor, filed exceptions. The four devisees and legatees objected to specific items of the account, including those hereafter discussed, which were questioned by respondent in the instant proceeding. All the objections to the first account were withdrawn at the time the account was settled. There was no evidence that appellant ever had an interest in the corporation, adverse to the estate, nor any interest except to wind it up to the best advantage of the creditors and the estate.

[9] Another reason stated for appellant's removal was that he had attempted to get court approval of a sale of the furniture and had caused it to be removed from a warehouse. It was shown that Mr. Wexler, when he offered to buy the furniture for $850, paid the storage charges of $603 and removed the furniture to his own warehouse or building, in order to save further storage charges. Nothing

more appears with reference to the furniture. There was no evidence that the estate had been in condition at any time to allow distribution of the furniture to Mrs. MacIntosh, but it appeared, to the contrary, that there had been, at all times, unsatisfied obligations. There was no evidence whatever that the furniture, or any part of it, had been lost, injured or destroyed or that it was not safely stored. Nevertheless, in this connection the court said: "If the furniture is lost the executor will be certainly chargeable with it. The value of the furniture must be very high. All that stuff sells," and, further: "I think this furniture alone is enough to remove the executor. The furniture has been removed from a warehouse. It is rather vague where it is. I think it should be taken into possession. It is a question —the correction of the amount against the storage charges." There was nothing in these facts to justify the removal of appellant as executor. He was in court seeking instructions as to what to do with the furniture. He could only keep it longer in storage, sell it, or, when the condition of the estate permitted, distribute it to respondent. He asked for permission to sell it, which was refused, and the estate still has it.

[10] Appellant was questioned at length as to the payment of a claim of the corporation against the estate in 1938. The estate was indebted to the corporation in the sum of some $14,746.76 for secondhand goods purchased by Wacholder from the corporation in the name of his brokerage company, through which he was accustomed to sell such goods. Appellant testified that in settlement of this debt the estate paid the corporation $10,689.93 in cash and transferred to it certain accounts and items of personal property at a price of $4,056.93. The transaction was reported in appellant's first account and approved, but was revived in the instant proceeding. Appellant, with the first account before him, repeatedly explained the transaction. His explanations were clear, but the attorneys for respondent claimed and still claim to remain unenlightened, or at least unconvinced. Their assertion was and still is that appellant in his account took a credit of $4,056.93 to which he was not entitled. We have examined appellant's first account which was before the trial judge and find that it fully supports appellant's testimony at the hearing. The account is in balance. It shows that appellant charged himself with the appraised value of items of personal property and accounts receivable in the sum of $6,888.04; that he sold these accounts to the corporation for a credit of $4,056.93 and paid the corporation $10,689.93 in cash, in satisfaction of its allowed claim for $14,746.76. He took credit in the account for $14,746.76 paid in settlement of the claim and also for $2,831.11 as a reduction of the inventory by reason of the loss in the sale of the personal property. The debts and credits each equal $17,577.87, and yet respondent, in her brief, says: "But the respondent contended that it was evident upon the face of the account that the appellant had failed to charge himself with the difference or $4,056.93. The court found this contention to be well *found,* and its conclusion to this effect was one of the potent factors that led to the making of the findings and the entry of the judgment involved in this appeal."

Turning to the record, we find appellant insisting not only that his account was correct, but that the order approving it could not be questioned, except upon the ground of fraud or by one under disability, and he pointed out that there was no charge of fraud in the settlement of that account, saying, "We have the authorities on that; fraud—and one other exception, where the interested person is physically incapacitated, or where a minor —The Court: That would enter here. If anything was wrong with the first account, it would be fraud anyway." After examining the account with reference to the $4,056.93 item, the court said: "It appears twice in Schedule A, once actually and once by deduction. I am not going into all that now, but this has gotten me to the point that I was just about ready to rule on, and I don't think we need to proceed," and the order of the court was: "The executor is instructed to submit a correct account within thirty days. * * * Petition for removal of executor; power suspended, letters revoked, and the accounts are simply not approved. It is subject to another true and correct account. I understand the court can refuse to accept an account if it is wrong in any one particular, so I have not in any way attempted to determine what parts of the account are true. I ask the executor to file another account." We repeat, there was no evidence whatever relating to the account which was then before the court, but only as to items of the first account. We have examined the first account with reference to some other items which were questioned by respondent and which were represented to the court as showing that appellant had taken other excessive credits in that account. No such improper credit appears in the account. The devisees and legatees had attacked the settlement of the corporation's claim of $14,746.76 and certain credits taken in that account for losses on sale. The withdrawal of their objections is the best proof that they were satisfied with the account.

Appellant filed a supplement to his second account which did not differ from the original second account, except by showing that he had advanced an additional $10 to the estate, and this came on for hearing without further objections by respondent. Appellant had had his accounts examined by the resident partner of an accounting firm, whom he offered as a witness to testify that the accounts were in balance and that appellant had accounted for all of the assets with which he was charged, and appellant insisted upon proceeding with the hearing, saying, "* * * your Honor did not foreclose us from proving any of these items that are in dispute at this time," and the court said: "I don't think so, except this; I would be very hesitant to put a stamp of approval on this account at this time. I have already suggested to the other side that I think they are up against a pretty forlorn hope. I am not at all certain they are going to get very far, but I think they have the right to try. It might avoid a lot of trouble. I feel quite competent that I am not going to approve this account, today in any event, and they may, after they have had two or three months to see what they can do—they may give up and we will accept the account as it is, because there is nothing else left to be done." Appellant's attorney recalled that the court had suggested a reference of the matter and stated that appellant would welcome it, but no ruling was made upon it. Appellant again insisted that his accountant should be allowed to testify, saying, "I do not want to leave this courtroom with the charge I absconded with that money," and the court said, "You know what the testimony of your own witness is, so it is not necessary to present it." The matter was continued over appellant's objection. The court then appointed Ruby B. MacIntosh special administratrix and fixed her bond at $5,000.

No criticism was made of any act of appellant or failure to act after the settlement of his first account, except that which related to the proposed sale of the furniture. There remained unpaid one claim of $2,388.13 which appellant reported in his present account as having been settled by the conveyance of the estate's interest in Lot 4 of Tract 2043, Los Angeles County, in which settlement the creditor gave a full release and paid the estate $626.69. Claims of Miss Reid for $5,500 had been disallowed by the executor and she had brought suit upon them. Her claims were settled by transferring to her certain items of jewelry and paying her the sum of $321.50. The settlements with these creditors were made after appellant had sought and obtained court approval. These matters reflected no neglect or incompetence on the part of the executor. By appellant's second account, the remaining assets of the estate were shown to consist only of a lot in Lake County of the value of $5, the household furniture and furnishings, the stock in the defunct corporation, which had been appraised at $3,405, and the good will and trade name of a defunct brokerage business which had been appraised at $100, which items of stock and good will were shown to be without value. Incidentally, appellant offered at the hearing to furnish a bill of particulars as to the amounts he had advanced to the estate, and he presented vouchers for the sums which he had paid out.

[11] The procedure which was followed, consisting of the removal of the executor and the appointment of a special administratrix appears to have resulted from a misconception as to the jurisdiction of the court in probate. This is illustrated by the statement of the court above quoted, "but it can never be tested unless some administrator is appointed who will, if necessary, sue the executor," and in the statement of counsel for respondent during the last hearing that, "I think now that we have a new administrator in the estate we can sufficiently prepare our remedy by suing Mr. Botsford for the amount of the discrepancy we claim in the estate." It appears to have been overlooked that any matters in controversy between the estate and appellant were exclusively for determination by the court in probate, in the settlement of appellant's accounts. The removal of appellant as executor could not shift such matters from the probate to the general jurisdiction of the court. Best v. Coloneus, 56 Cal.App.2d 285, 287, 132 P.2d 260, and cases therein cited.

The further proceedings which will be required in the matter of the estate will consist of hearings for the settlement of appellant's second account, supplement thereto, and any further accounts which he may present. If the finality of the order settling his first account is to be questioned, it must be upon recognized legal grounds and under appropriate pleadings. His accounts must be settled in any event, but the consequences of the order removing him, if it should be sustained, would be disastrous to him. He would have been convicted of waste, mismanagement and neglect; he could not prove his innocence of these charges in any future proceedings and would stand before the court as an unfaithful and discredited trustee.

[12] The fact that appellant is an attorney at law inclines us to make some additional observations. Appellant did not draw Mr. Wacholder's will and there was no evidence that he sought appointment as executor. He was chosen by Mr. Wacholder as one considered qualified to act as executor of the will. The will authorized the executors to carry on any businesses of the estate at the risk of the estate. Appellant was familiar with Mr. Wacholder's affairs and must have known that they were in a precarious condition. By reason of the unexpected death of Mr. MacIntosh, the burden of liquidating the corporation's business was cast upon appellant and Mrs. MacIntosh. The estate, also, was largely indebted, and appellant's task was to pay or compromise the obligations of the estate and, if possible, save something for the beneficiaries of the will. It was a business which required close attention and much effort and, so far as disclosed by the record, appellant was both vigilant and competent in the performance of his duties. Such difficult responsibilities are frequently cast upon attorneys and are undertaken with the knowledge that the compensation will be meager, and this, we think, is a practice which should not be discouraged. While it is the clear duty of the court to remove an executor or administrator when his unfitness has been proved, it is at the same time the right of every trustee to receive full acquittance of charges impugning his integrity or competence which are not established by clear and satisfactory evidence.

The order is reversed insofar as it directs the removal of appellant as executor and denies his application for reduction of his bond. The appeal from those portions of the order which denied the petition for instructions and which deferred action upon his accounts is dismissed, appellant to recover costs.

DESMOND, P. J., concurs.

WOOD, Justice.

I dissent. In my opinion the orders should be affirmed.

76 Cal.App.2d 496

PEOPLE v. KIRK.

Cr. 645.

District Court of Appeal, Fourth District, California.

Oct. 15, 1946.

Hearing Denied Nov. 14, 1946.

1. Criminal law ⟹1110(1)

Absence of certification by trial judge of court's transcript on appeal could not aid appellant's cause, but where appellant was confined in prison and could not conveniently secure the correction, appellate court would have proper certificate attached to transcript. Rules on Appeal, rule 35(c).

2. Criminal law ⟹997

Whether a person confined in penitentiary should be returned to court to argue petition for writ of error coram nobis rested in sound discretion of court in which petition was to be heard, and court did not abuse its discretion in refusing to order petitioner's return where petition showed that allegedly perjured portion of testimony on which conviction of murder was based was wholly immaterial.

3. Criminal law ⟹997
Habeas corpus ⟹30(1)

A defendant is entitled to review by independent process of proceedings resulting in his conviction if state has contrived a conviction through pretense of a trial which in truth is but used as a means of depriving defendant of liberty through a deliberate deception of court and jury by presentation of testimony known to be perjured.

4. Criminal law ⟹997

Defendant, to be entitled to relief by way of writ of error coram nobis, must show that some fact existed which, without fault or negligence on his part, was not presented to court at trial on the merits, and which if presented would have prevented rendition of the judgment.

5. Criminal law ⟹997

The petition for writ of error coram nobis cannot be used as a substitute for motion for new trial or appeal.

6. Criminal law ⟹997

Whether affidavit, though uncontradicted, of one convicted of first degree murder that he was induced by district attorney and sheriff to testify falsely at trial of petitioner for same offense was sufficient to justify issuance of writ of error coram nobis to review petitioner's conviction was a question of fact for the trier of fact. Code Civ.Proc. § 1963, subds. 1, 15, 33.

7. Criminal law ⟹997

Petition for writ of error coram nobis to review conviction of first degree murder on ground that one previously convicted of same offense was induced by district attorney and sheriff to testify falsely against petitioner was properly denied, where allegedly false testimony differed from that given by witness at his own trial only on immaterial points and could not have influenced verdict.

Appeal from Superior Court, San Bernardino County; Stanley Mussell, Judge.

Harry Albert Kirk was convicted of murder in the first degree and from an order denying his petition for a writ of error coram nobis, he appeals.

Order affirmed.

Harry Albert Kirk, in pro. per.

Robert W. Kenny, Atty. Gen., Alberta Gattone, Deputy Atty. Gen., of San Francisco, and Jerome B. Kavanaugh, Dist. Atty., of San Bernardino, for respondent.

MARKS, Justice.

This is an appeal from an order denying a petition for a writ of error coram nobis.

Defendant seeks reversal of the order on three grounds: (1) That the clerk's transcript on appeal (the only transcript before us) is defective in that it is not certified to by the trial judge. (2) That the trial court abused its discretion in failing to order defendant's return from Folsom penitentiary, where he was confined, to present and argue his petition as he was appearing in propria persona. (3) That the trial judge abused his discretion in denying the petition because it was established by an uncontradicted affidavit that defendant's conviction was secured through the perjured testimony of one Harry J. Baker at the solicitation and with the knowledge and connivance of the district attorney and sheriff of San Bernardino County. We will consider the questions presented in the order stated.

[1] As filed here, the clerk's transcript did not contain any certification by the trial judge as required by subdivision (c) of Rule 35 of Rules on Appeal. Such certification was necessary under the rule, assuming there were no proposed corrections served and filed as stated by the Attorney General. Defendant is the moving party, and the appellant, and a defective record cannot aid his cause. However, as he is confined in prison and cannot conveniently secure the correction, this court has had the proper certificate attached to the transcript.

[2] The decision of the question of returning a person confined in a penitentiary, to court, to argue a petition for a writ of error coram nobis, should be within the sound discretion of the court in which it is to be heard. We find no breach of discretion in the ruling on this matter. Our reasons for this conclusion will appear in our discussion of the next question.

[3] The third question argued presents other problems. It seems settled that a defendant is entitled to a review by independent process of the proceedings resulting in his conviction, "* * * if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured." Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 342, 79 L.Ed. 791, 98 A.L.R. 406. Whether this review should be by means of a writ of error coram nobis or through a writ of habeas corpus does not seem so clear (Mooney v. Holohan, supra; People v. Mooney, 178 Cal. 525, 174 P. 325; In re Mooney, 10 Cal.2d 1, 73 P.2d 554; Ex parte Knight, 62 Cal.App.2d 582, 144 P.2d 882), although these decisions seem to indicate that the writ of habeas corpus is the preferred remedy in a case like the one before us. However, we will assume, without holding, that the petition for a writ of error coram nobis may be available to defendant.

In defining some of the functions of the writ of error coram nobis in People v. Mooney, supra [178 Cal. 525, 174 P. 326], the Supreme Court quoted the following from Freeman on Judgments: "'But this writ does not lie to correct any error in the judgment of the court, nor to contradict or put in issue any fact directly passed upon and affirmed by the judgment itself. If this could be, there would be no end of litigation. * * * The writ of error coram nobis is not intended to authorize any court to review and revise its opinions, but only to enable it to recall some adjudication made while some fact existed which, if before the court, would have *prevented the rendition of the judgment,* and which without fault or negligence of the party, was not presented to the court.' 1 Freeman on Judgments, sec. 94. The italics are ours."

[4] It seems to be thoroughly settled that "to entitle the defendant to relief by way of the writ of error coram nobis he must show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment. People v. Gilbert, 25 Cal.2d 422, 442, 154 P.2d 657." People v. Mendez, 28 Cal.2d 686, 171 P.2d 425. With these rules in mind we must examine the record presented by defendant to determine if he has made any showing to entitle him to the use of this extraordinary remedy.

[5] In his notice of motion, or petition for the writ of error coram nobis, defendant specifies, as grounds for issuing the writ, several alleged errors of law occurring at his trial. We will give no further attention to these alleged errors as they were reviewable on a motion for new trial or on appeal, and can furnish no ground for issuing the writ. The petition for a

writ of error coram nobis cannot be used as a substitute for a motion for new trial or an appeal. People v. Knight, 73 Cal. App.2d 532, 166 P.2d 899; People v. Hightower, 75 Cal.App.2d 298, 170 P.2d 490.

Harry J. Baker was accused of the murder of James Winn. He was tried and convicted of murder in the first degree in 1925. He was a witness in his own behalf.

In 1941, defendant was arrested and charged with the murder of the same person. He was convicted of murder in the first degree and sentenced to life imprisonment. Baker appeared as a witness for the People at this trial.

The two met in Folsom penitentiary in 1944, when defendant learned for the first time that Baker had changed his testimony in the Kirk trial from that given at the Baker trial; that Baker claimed he had done this at the suggestion and on the insistence of the district attorney of San Bernardino County, and promises that the district attorney and sheriff of that county would assist Baker in securing a parole, and under threats of death by the sheriff if he (Baker) did not change his testimony and testify against Kirk in accordance with the story outlined to him by the district attorney; that he did so testify falsely against Kirk. This is supported by an affidavit made by Baker.

[6] These are serious charges, but the weight to be given them is affected by the character of the witness making them. This witness is a convicted murderer who would have us believe he is also guilty of deliberate and wilful perjury. It might be questioned if charges made by a person of such base character were sufficient to overcome the presumptions set forth in subdivisions 1, 15 and 33 of section 1963 of the Code of Civil Procedure and sustain the attack made on two officials with well known records of long and honorable service. At least this should be considered a question of fact for the trier of fact. However, we do not need to base our affirmance of the order solely on that ground.

Brief extracts from the records of the Baker and Kirk trials are before us. These show that there are but two variances in the testimony of Baker. During his own trial he testified that Kirk drove an automobile evidently used in connection with the killing and that Kirk changed both license plates on the car. During the Kirk trial he testified that he (Baker) drove the automobile and that he changed one license plate and Kirk the other. Nowhere in the record before us does Kirk deny his complicity in the murder of Winn nor claim his innocence of the crime of which he was convicted.

[7] What possible difference there would have been in the result of the Kirk trial had it appeared that Kirk, instead of Baker, drove the automobile, or that the two men, instead of one of them, changed the license plates, is not made to appear. So far as we can determine, the change in Baker's testimony was on immaterial points and could not have influenced the jury in finding Kirk guilty. There is nothing to indicate that if Baker had testified in the Kirk trial, strictly in conformity with his evidence in his own trial, that it would have prevented the verdict and judgment against Kirk. Thus, the showing made here is entirely insufficient to permit the disturbing of the judgment against Kirk. People v. Mendez, supra.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

76 Cal.App.2d 556

SCHAEFER et al. v. LACK.

Civ. 15205.

District Court of Appeal, Second District, Division 3, California.

Oct. 18, 1946.

Rehearing Denied Nov. 8, 1946.

Hearing Denied Dec. 16, 1946.

1. Attorney and client ⚷162

Attorneys' action against client to recover attorneys' fees for legal services rendered on appeal, was not premature, notwithstanding that proceedings subsequent to appeal were pending directed toward the recovery of damages in behalf of client, where attorneys' contract with client obligated attorneys to render legal services only in the matter of the appeal.

2. Appeal and error ⚷1008(3)

Where trial court's construction of instrument appears consistent with true intent of parties as shown by attendant circumstances, reviewing court will not substitute another interpretation, though equally tenable.

3. Attorney and client ⚷141, 163

Where client agreed to pay attorney a reasonable fee and agreed to the employment of associate counsel who was to be paid by attorney, and attorney agreed to divide fee equally with counsel, and counsel was formally substituted into case by client as co-counsel, counsel's legal services were properly included with attorney's services in evaluating attorney's fee, and counsel, as equitable if not legal assignee of one-half of the fee, was a real party in interest and could join with attorney in action against client for reasonable value of services rendered. Code Civ.Proc. § 367.

4. Attorney and client ⚷160

Where client agreed to pay attorney a reasonable fee for legal services, and efforts of client and attorney to agree upon fee were unsuccessful, and attorney thereafter demanded payment, an action for reasonable value of services rendered was proper.

5. Attorney and client ⚷166(3)

In attorney's action against client to recover reasonable fee for legal services rendered on appeal, evidence relating to value of and income from hotel which was recovered by client on the appeal, was pertinent to show reasonable value of legal services.

6. Attorney and client ⚷166(3)

In action concerning value of legal services, evidence of the nature of the litigation, the amount involved, the value of the real estate in controversy, the monthly rental thereof and the results obtained, is competent.

7. Witnesses ⚷268(6)

In attorneys' action against client to recover reasonable fee for services rendered on appeal on which a hotel was recovered for client, cross-examination of client as to other businesses to which client gave his attention, was proper, where client testified under direct examination that he spent 24 hours a day managing the hotel.

8. Appeal and error ⚷989, 1001(1)

In reviewing court, question of sufficiency of evidence is limited to single inquiry whether there is substantial evidence supporting verdict, and if record discloses such evidence, verdict will not be disturbed.

9. Attorney and client ⚷166(3)

Evidence that legal problems presented by appeal were complex, and that attorneys spent 578.17 hours on the appeal, and that as a result thereof client received $8,817.87 in insurance moneys and a hotel valued at $206,500 and bringing in a monthly income of $1,750, and that expert witnesses believed that reasonable value of attorneys' services was from $30,000 to $40,000, warranted verdict awarding attorneys $24,145.77 as the reasonable value of their services.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by John L. Schaefer and Henry S. Dottenheim against Fred S. Lack to recover attorneys' fees. The defendant filed a cross-complaint. From the judgment, the defendant appealed. Subsequent to the entry of judgment John L. Schaefer died, and his wife, Katherine F. Schaefer, as special administratrix of his estate, was substituted in his place.

Affirmed.

Harry W. Horton, of El Centro, for appellant.

Tripp, Callaway, Sampson & Dryden, of Los Angeles, for respondents.

KINCAID, Justice pro tem.

John L. Schaefer and Henry S. Dottenheim, each an attorney at law, duly licensed to practice as such in California, brought the within action to recover attorneys' fees from defendant, as their client, for services performed in connection with an appeal from a judgment of the United States District Court, for the southern district of California, to the Ninth Circuit Court of Appeals.

The cause was tried before a jury, resulting in a verdict and judgment in behalf of plaintiffs in the sum of $24,145.77, from which defendant now appeals. Subsequent to the entry of judgment, plaintiff John L. Schaefer died, and his wife, Katherine F. Schaefer, as special administratrix of his estate, was substituted in his place and stead.

In order to understand the issues presented in this action, some historical background must first be laid.

In 1934, Lack was the owner of certain furniture and fixtures contained in the Hotel Dunlack, located in Brawley, California. The hotel was owned by Western Loan and Building Company, a corporation, hereinafter called Western, it having taken over such ownership following a default in the loan which it had previously made thereon. A contract was entered into between Western and Lack whereby the latter assigned his furniture and fixtures to Western, and such corporation leased the hotel and all equipment therein to Lack for a period of years with an option to purchase same, all rentals paid during the period to apply on the option. The contract further provided that if the premises were damaged by any casualty Western should repair them, if repairable within 20 working days, otherwise the lease should terminate and the parties be released from all obligations thereafter accruing. Lack took possession of the hotel on January 1, 1935, and made improvements thereon. In 1939 Lack procured and delivered to Western a policy of insurance against loss or damage to the hotel building by earthquake. On May 19, 1940, the hotel building was severely damaged by earthquake. Negotiations were thereupon had between Lack and Western in an effort to settle the legal and contractual rights of each, but without success. Western then filed an action in the District Court of the United States against Lack and the insurance company. Lack thereupon employed John L. Schaefer as his attorney and an answer to such complaint was filed. The insurance company interpleaded and deposited the sum of $28,067.87 in court and was permitted to withdraw from the action. Lack, through his attorney, then filed an action in the superior court of the State of California, in the county of Imperial, with Western as the defendant, asking, in effect, a specific performance of his contract with Western and that it be compelled to make all repairs for the damage to the hotel sustained by the earthquake. A second cause of action prayed for damages claimed to have been sustained by its failure to make such repairs. By appropriate proceedings Western caused this action to be removed to the District Court of the United States, where both actions were then consolidated for trial.

The trial court, sitting without a jury, found that the repairs could not be made in 20 days, that the lease terminated the day of the earthquake, together with the option, that all moneys which had theretofore been paid by Lack as rentals, or by way of improvements to the premises, were forfeited to Western, and that all of the insurance money belonged to it, the furniture and furnishings, however, belonging to Lack. Judgment was entered accordingly, from which Lack appealed.

Schaefer, in behalf of Lack, filed the notice of appeal in such action and took all preliminary steps toward the perfection of the record on appeal. After Schaefer had done considerable work on such appeal he became ill and was confined in a hospital.

He thereupon advised Lack that because of the condition of his health another attorney should be substituted. Plaintiff, Henry S. Dottenheim, was discussed between them as a possibility and it was agreed between Schaefer and Lack that Dottenheim should be employed with the understanding that Lack was doing business with Schaefer and that the latter would have to take care of Dottenheim out of any arrangement that Lack and Schaefer made.

On July 27, 1942, Lack signed a substitution of attorneys naming Dottenheim and Schaefer, in lieu of Schaefer alone, as his attorneys in the cause then on appeal from the United States District Court. On August 19, 1942, the following letter agreement was executed:

"In re: F. S. Lack v. Western Loan & Building Co.

"Dear Mr. Schaefer:

"This letter, when accepted by you, constitutes the agreement between us, in the matter of the appeal in my case in the Circuit Court of Appeals against The Western Loan and Building Co. and confirms my previous authorization for you to retain Mr. Henry H. Dottenheim as associate counsel with you in said appeal. You will, however make your own arrangements with Mr. Dottenheim.

"For legal services rendered me in said appeal I confirm the previous arrangements with you as follows:

"1. I will pay you a retainer of Six Hundred ($600.00) Dollars payable as follows: One Hundred Dollars forthwith and One Hundred Dollars each thirty days hereafter until the said Six Hundred Dollars is paid in full.

"2. Should the Court award me only a decree of specific performance then I will pay you such additional sum as you and I may then agree to be fair and reasonable under the circumstances.

"3. If the court decides that I am entitled to recover a sum of money in addition to the Insurance award, with or without an award for specific performance, then and in that event I will pay you One Third of such money award, when as and if the same is collected by settlement or order of Court.

"4. I will pay all costs incurred in this appeal and it is expressly understood that neither you nor Mr. Dottenheim shall have any interest in the real property, land, buildingg, or the improvements involved in this appeal. Said Six Hundred Dollars shall be deducted from any additional fee paid hereunder. Very truly yours,

"(Signed) F. S. Lack

F. S. Lack

"Accepted this 19th day of August, 1942.

"(Signed) John L. Schaefer

"John L. Schaefer."

On the following day, Schaefer delivered a letter to Dottenheim reading as follows:

"This is to confirm our agreement regarding the fees in the above entitled matter.

"Annexed hereto is the agreement between me and Mr. Lack regarding the fees.

"It is understood that of the $600.00 retainer provided for therein, you are to receive the first three checks of $100.00 each and I am to receive the next three checks.

"All other fees are to be divided equally between us.

"Any fees agreed upon, as provided for in paragraph 2 of the agreement, will not be arrived at without prior consultation with you and your agreement as to the fairness and reasonableness of the fee agreed upon."

A copy of this letter was delivered to Lack by Schaefer on the same day it was written.

The decision of the Circuit Court of Appeals was handed down April 9, 1943, and is reported in Lack v. Western Loan & Building Co., 9 Cir., 134 F.2d 1017, wherein the judgment of the trial court was reversed with directions that judgment be entered in favor of Lack, requiring Western to convey to Lack the hotel property, awarding Western only the balance of the purchase price under the original agreement between such parties in the sum of $19,250, to be paid out of the insurance funds, and awarding Lack the remainder of such fund of $8,817.87. No mention of interest or damages was made in such opinion, and the trial court refused, on motion of Lack, to enter a decree providing therefor. Lack, through his attorneys, then again appealed to the Circuit Court of Appeals on these questions, which appeal was dismissed. The court, in ordering such dismissal, held that the directed judgment was a final disposition of the appeal and not subject to further appeal, in that its mandate instructed the District Court to enter a final rather than an interlocutory judgment. Lack v. Western Loan & Building Co., 9 Cir., 146 F.2d 852. A petition for writ of certiorari to the Supreme Court of the United States then followed in behalf of Lack, which petition was denied on April 23, 1945.

Efforts then continued and are now continuing in behalf of Lack in the District Court to obtain damages claimed to have accrued to him during the interval between the erroneous decree in that court and its reversal in the circuit court. As the complaint herein was filed March 9, 1944, it is apparent that the matter of the recovery of damages in behalf of Lack was still open and being pursued both at that date and at the time of trial of the instant case.

Prior to the filing of this action both Schaefer and Dottenheim endeavored to reach an understanding with Lack concerning the amount due them as attorneys' fees on the appeal, but without success. Demand was thereupon made by such attorneys upon Lack for the payment of the sum of $35,000, as being the reasonable value of the legal services rendered him by them, and payment was refused. The within action was then instituted for the recovery of such sum for the legal services rendered defendant on the appeal in accordance with the contract with defendant of August 19, 1942. Defendant, in addition to denying that he owed any sum whatsoever to plaintiffs, claimed both by way of counterclaim and cross-complaint that he had been heavily damaged by reason of the negligence of plaintiffs in the handling of his legal matters on such appeal because of their failure to recover damages for him against Western and in other particulars.

The jury returned the verdict which constitutes, under the evidence, an allowance of $25,000 as attorneys' fees for plaintiffs, less a credit to defendant of the sum of $600, being the original retainer paid, and the further sum of $254.23 found to be due defendant as interest on certain checks received by such attorneys from Western and later delivered by them to him.

Defendant-appellant first urges as ground for reversal of the judgment herein that his contract as to attorneys' fees is not severable so as to permit plaintiffs to sue under paragraph 2 thereof for the reasonable value of their legal services rendered on the appeal because, at the time of trial of the instant case, proceedings were still pending in the federal courts directed toward the recovery from Western of damages of which plaintiffs would be entitled to one-third. For this reason he maintains that the action is premature. A proposed instruction to this effect was submitted by defendant and rejected by the trial judge and the jury was instructed that as a result of the appeal a reversal of the judgment was had whereby Lack obtained specific performance of his contract with Western and a return of the hotel property, as a consequence of which plaintiffs are entitled to such a sum, in addition to the $600 retainer, as may be fair and reasonable for their services in handling such appeal.

By its terms the contract obligated Schaefer to render legal services only in the matter of the appeal of defendant's case from the District Court to the Circuit Court of Appeals. He in turn was authorized to employ Dottenheim to assist him in that task. Since varying results might be obtained by the appeal the parties to the agreement provided for a different basis of compensation dependent upon the nature of the outcome. From its language, as well as the evidence, the trial judge could very well interpret the agreement to mean that, if no success attended the appeal, Lack was under no obligation to further pay plaintiffs; if he obtained specific performance he was to pay a reasonable fee; if he obtained any money by virtue of the appeal in addition to the insurance award, with or without specific performance, he was to pay one-third thereof.

[1, 2] Plaintiffs, in behalf of defendant, were successful in obtaining a reversal of the judgment by virtue of the appeal. The Circuit Court of Appeals ordered specific performance of Lack's contract with Western and the payment to him of a substantial portion of the insurance award. No additional moneys by way of damages, or otherwise, were ordered nor mentioned from which plaintiffs might obtain any proportionate part as attorneys' fees. The fact that additional legal efforts were exerted by plaintiffs subsequent to the said appeal to obtain a further allowance by way of damages does not necessarily affect their right to recover for the services rendered by them on the particular appeal for which they were employed. In the light of the evidence the construction so given the agreement by the trial judge seems to have been reasonable and consistent with the intent of the parties making it. Under such conditions courts of appellate jurisdiction will not substitute another interpretation even though it may seem equally tenable. Johnston v. Landucci, 1942, 21 Cal.2d 63, 69, 130 P.2d 405, 148 A.L.R. 1355; Wilson v. Brown, 1936, 5 Cal.2d 425, 55 P.2d 485; Hale v. Harbor Petroleum Corp., 1934, 139 Cal.App. 455, 33 P.2d 1039.

[3, 4] Defendant urges prejudicial error in the fact that Dottenheim appears as a party plaintiff with Schaefer, although the contract of employment is with the latter only. He argues that no contract, express or implied, exists as between Dottenheim and himself but that such attorney must look only to Schaefer as to his claim for any compensation. In support of this position defendant cites authorities for the proposition that, in the absence of authority from, or assent by, the principal, an attorney is not empowered to employ assistant counsel at the expense of his client. Here, however, Dottenheim was employed as associate counsel with Schaefer for the appeal, with the express written assent of defendant, subject only to the condition that Schaefer would make his own arrangements with such associate. The letter of August 20, 1942, from Schaefer to Dottenheim, which is above set forth, a copy of which was delivered to defendant, constituted the arrangement so made between the plaintiffs whereby all fees accruing to Schaefer under his contract with defendant were to be equally divided between them. Dottenheim was formally substituted into the case by defendant as cocounsel with Schaefer. Under such conditions the legal services performed by Dottenheim are properly included with those by Schaefer in evaluating the reasonable fee to be paid by defendant under his contract and Dottenheim, as an equitable if not a legal assignee of one-half of such earned fee, is a real party in interest with the right to bring suit thereon in his own name. Code Civ.Proc. § 367; 3 Cal.Jur. 297, sec. 43; Tornquist v. Johnson, 1932, 124 Cal.App. 634, 641, 13 P.2d 405. As Dottenheim's services must necessarily be included with those of Schaefer it is difficult to see, in any event, how the addition of Dottenheim as a party plaintiff can be held to be prejudicial to the defendant. The unsuccessful efforts to agree upon a fee and demand for payment having followed, an action for the reasonable value of the services rendered was proper. Stuart v. Preston, 1934, 2 Cal.App.2d 310, 316, 38 P.2d 155; Elconin v. Yalen, 1929, 208 Cal. 546, 549, 282 P. 791; Nave v. Taugher, 1920, 49 Cal.App. 308, 312, 193 P. 508.

Defendant makes the further point that the judgment, based upon the verdict herein, is unreasonable, excessive and given under the influence of prejudice. He argues, in support of this position, that the appeal dealt only with the recovery of a hotel which was so damaged as to require the expenditure of some $44,000 to repair it, and insurance funds of about $28,000. He claims prejudicial error by the receipt in evidence of testimony as to the value of and the income from the hotel property, both before and after it was repaired.

[5-7] Evidence was adduced, by competent witnesses, to the effect that the hotel property, on the date of its recovery by the appeal and prior to making the necessary repairs, was of the reasonable value of $162,256.78; that the actual cost of such repairs was $44,243.22, leaving a gross

value of the hotel after repair of $206,500; that prior to its being damaged it netted Lack about $1,766 per month and that in May of 1945 the income therefrom was $1,750 a month. Such evidence was pertinent and relevant as a circumstance tending to show the reasonable value of the legal services performed on the appeal. It is always competent, in an action concerning the value of legal services, to prove the nature of the litigation, the amount involved, the value of the real estate in controversy, the monthly rental thereof and the results obtained. 3 Cal.Jur. 710, sec. 108; Cusick v. Boyne, 1905, 1 Cal. App. 643, 646, 82 P. 985. Defendant claims that the jury was improperly influenced by the elicitation from him, on cross-examination, of certain information as to other properties owned by him. The record discloses, however, that this line of inquiry was in response to a statement by Lack on direct examination to the effect that he and his wife spent about 24 hours a day in managing the hotel. To contradict this assertion he was asked concerning other businesses operated by him to which he also gave his time and attention. His counsel thereupon stipulated that he had previously testified at the time of taking his deposition that he spent quite a bit of time in connection with other enterprises. In the light of defendant's direct testimony the cross-examination to which objection is made was properly admitted. Our attention has been called to nothing further in the record which can be said to have improperly or prejudicially influenced the jury contrary to the interests of the defendant in its fixation of the amount found due plaintiffs by the verdict.

[8] The sum so allowed is further protested as being unfair, unconscionable and unreasonable, when compared to that which any ordinarily competent attorney might be entitled for the handling of the appeal in question. The evidence as to the reasonableness of the fee is at great variance. Two reputable and competent attorneys were called as witnesses by the plaintiffs and two of similar standing testified in behalf of defendant. Those for plaintiff gave values of from $30,000 to $40,000 while defendant's witnesses advanced values of from $1,500 to $2,500. Even if we were to assume that the fee awarded is higher than we would have allowed if called upon to fix it in the first instance, we are limited on appeal to the single inquiry as to whether there is substantial evidence supporting the verdict. If the record discloses such evidence the issue as to the value of the services may be considered as having been closed by the finding of the jury. Stuart v. Preston, supra, 2 Cal.App.2d 310, 316, 38 P.2d 155; Treadwell v. Nickel, 1924, 194 Cal. 243, 251, 228 P. 25; Grass v. Rindge Co., 1927, 84 Cal.App. 750, 766, 258 P. 673.

[9] In support of such finding the evidence shows that at the time plaintiffs began their legal work on the appeal they were confronted with a trial court judgment which had the practical effect of wiping out all of the interest which their client, the defendant herein, had owned in the hotel property, save and excepting the furniture and furnishings. The legal problems presented by this appeal were manifold, complex, and required a high degree of skilled legal training and ability. Dottenheim spent 415.17 hours on the appeal and Schaefer spent approximately 163 hours. The extent of the success achieved by their efforts is shown by the obtaining of a complete reversal of the judgment at the hands of the Circuit Court of Appeals, resulting in Lack recovering full ownership of the hotel property, plus $8,817.87 in insurance moneys. This evidence, when taken with that relating to the value of the property involved and the opinions of the expert witnesses as to the reasonable value of plaintiffs' services, is sufficiently substantial to fully support the verdict and judgment herein. In addition thereto defendant moved for a new trial upon the ground, among others, that the verdict was excessive. The denial of the motion expresses the determination of the trial judge that the verdict was not against the weight of the evidence.

We have considered the other points raised by defendant on this appeal but find them lacking in merit. No prejudicial error is shown either on the court's rulings on the admissibility of the evidence, or in the instructions as given the jury.

The judgment is affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

PERGUICA et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. *

Civ. 7277.

District Court of Appeal, Third District, California.

Oct. 23, 1946.

Rehearing Denied Nov. 20, 1946.

Hearing Granted Dec. 19, 1946.

1. Workmen's compensation 🔑1939

Factual question whether deceased who was employed to do lathing on house under construction, was an employee of the owner of the house so as to be within the compensation act, or was an independant contractor and not within the act, was primarily a question for the Industrial Accident Commission. Labor Code, § 5705(a).

2. Workmen's compensation 🔑1939

Industrial Accident Commission's finding that one employed by owner of house under construction to do lathing at certain price a square foot, was an "employee" within the compensation act, and not an "independent contractor" was not incorrect as a matter of law. Labor Code, § 5705(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

3. Workmen's compensation 🔑617

Ordinarily the purpose of employee's act out of which injury arose, rather than method of its performance, determines whether he was injured in course of his employment within meaning of compensation act, unless employee's act, even though intended to forward employer's purpose, was of such an exceptional nature that it could not reasonably be said to be within the scope of the employment.

4. Workmen's compensation 🔑635

Employee who was hired to do lathing on house under construction, and who was fatally injured while transporting scaffolding to the house, received compensable injuries in "course of employment".

See Words and Phrases, Permanent Edition, for all other definitions of "Course of Employment".

Proceeding under the Workmen's Compensation Act by Ruth Walker and others, compensation claimants, opposed by Manuel Perguica, employer, and the Industrial Indemnity Company, a corporation, insurance carrier, to recover compensation for the death of Dallas Walker, deceased, alleged employee. From an award of the Industrial Accident Commission of State of California in favor of the claimants, Manuel Perguica and Industrial Indemnity Company, a corporation, appeal.

Award affirmed.

Leonard, Hanna & Brophy, of San Francisco, for petitioner.

R. C. McKellips and Edward A. Sarkisian, both of San Francisco, for respondents.

PEEK, Justice.

Dallas Walker, husband and father respectively of respondents Ruth Walker, and Richard, Beverly, Patricia and Cecilia Walker, minors, was fatally injured while transporting scaffolding to a house under construction on which he was to do the lathing for Manuel Perguica, the owner and one of the petitioners herein. An application for benefits was filed by the widow on behalf of herself and the respondent minor children. At the conclusion of the hearing thereon the commission found that the decedent was an employee as distinguished from an independent contractor, but also found that the injury was not compensable in that it did not occur in the course of his employment, and denied compensation. On petition of said respondents a rehearing was granted, and again the commission found that decedent was an employee of petitioner Perguica, but contrary to its former determination, found and concluded that the injury was compensable as one arising out of and occurring in the course of his employment.

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* Subsequent opinion 179 P.2d 812.

We find no merit in the contentions advanced by petitioners (1) that decedent was an independent contractor, and (2) that even if it be conceded that he was an employee of Perguica nevertheless his injury did not arise out of or occur in the course of his employment.

The record discloses that Walker was engaged by petitioner Perguica to put up wire netting or screening which was to serve as lathing for the plaster that would be applied by one Witmer, who had a contract to plaster the house. The arrangement which said petitioner made with Walker was never completely carried out, as the latter was fatally injured before the wiring or lathing was actually commenced. Walker was brought to said petitioner's premises by Witmer and, according to petitioner, was introduced to him as the "fellow to do the job; to put the wires". The conversation that ensued was mostly one-sided, Perguica informing the two men in more or less general terms what had to be done and what he would pay to have it done. Witmer was never called as a witness; so the nature of the conversation and its legal effect rest entirely upon the testimony of Perguica. While Mrs. Walker, the decedent's widow, testified as to the acts of her husband in loading and transporting the scaffolding, and as to the kind of work which he ordinarily did, she was not a party to the conversation and therefore her testimony sheds little if any light on the question of the relationship that was created between the decedent and said petitioner.

A summary of Perguica's testimony, omitting some facts already mentioned, is substantially as follows:

The carpenters who worked on his house were paid a daily wage; he had a contract with Witmer whereby the latter was to do the plastering for a lump sum; when Witmer brought Walker to him he informed them that the work of placing the wire screening or netting would be done on a yardage basis; he did not want any one else working on the house at day wages because "they can loaf around as much as they please"; he agreed to furnish the material and Walker agreed to put on the wire for 15 cents a yard; Walker gave him no estimate of the cost of the work; he did not tell Walker what to do because he did not know; he said nothing concerning any of the details of the job to Walker; at the time of their conversation it was late and he had other work to do; there was no discussion about price; nothing was mentioned regarding scaffolding; Walker just got the job and "afterwards I was going to pay him then." In conclusion he stated that he took Witmer's word that Walker was a good worker, and he agreed to pay Walker 15 cents a yard which, according to Witmer, was the price generally paid in that locality.

[1] Under the provisions of section 5705(a) of the Labor Code the burden of proving that decedent was an independent contractor was cast upon the employer Perguica. The factual question thus presented was primarily a question to be determined by the commission. Industrial Indemnity Exchange v. Industrial Acc. Comm., 26 Cal.2d 130, 136, 156 P.2d 926; Riskin v. Industrial Acc. Comm., 23 Cal.2d 248, 255, 144 P.2d 16.

[2] The many recent enunciations by our appellate courts of the rules for determining the existence of the employer-employee relationship within the meaning of the Workmen's Compensation Act would seem to make unnecessary further reiteration here. See, Baugh v. Rogers, 24 Cal.2d 200, 206, 148 P.2d 633, 152 A.L.R. 1043; Riskin v. Industrial Acc. Comm., supra, 23 Cal.2d at pages 253, 254, 144 P.2d at pages 18, 19; Burlingham v. Gray, 22 Cal.2d 87, 99, 100, 137 P.2d 9; Yucaipa Farmers etc. Ass'n v. Industrial Acc. Comm., 55 Cal.App.2d 234, 237, 238, 130 P.2d 146; Los Flores School Dist. v. Industrial Acc. Comm., 13 Cal.App.2d 180, 183, 56 P.2d 581. Suffice it to say that, although the manner of entering into the relationship herein was informal and the evidence re-

lating thereto neither extensive nor definite, nevertheless that is not to say that such evidence was not sufficient to support the inferences drawn therefrom and the findings made by the commission. Even if such evidence was as reasonably subject to the inferences now advanced by petitioners as those deduced by the commission, we cannot say as a matter of law that the determination reached by the commission is incorrect. Industrial Indemnity Exchange v. Industrial Acc. Comm., supra, 26 Cal.2d at page 136, 156 P.2d at page 929; Riskin v. Industrial Acc. Comm., supra, 23 Cal.2d at page 255, 144 P.2d at page 19.

The question raised by petitioners' second contention, whether the injuries arose out of or occurred in the course of the employment, likewise was at issue in the Industrial Indemnity Exchange case. There the court stated, 26 Cal.2d at page 136, 156 P.2d at page 929, that,

"Whether an employee's injury occurred in the course of his employment is a question of fact to be determined in light of the circumstances of the particular case. San Bernardino County v. Industrial Acc. Comm., 217 Cal. 618, 20 P.2d 673; Griffin v. Industrial Acc. Comm., 19 Cal.App.2d 727, 66 P.2d 176.

"It is generally said that '"an employee is in the 'course of his employment' when he does those reasonable things which his contract with his employer expressly or impliedly permits him to do."' Hartford A. & I. Co. v. Industrial Acc. Comm., 202 Cal. 688, 691, 262 P. 309, 310, 58 A.L.R. 1392; State Comp. Ins. Fund v. Industrial Acc. Comm., 194 Cal. 28, 33, 227 P. 168. In view of the policy of liberal construction in favor of the employee, any reasonable doubt as to whether the act performed at the time of injury was contemplated by the employment should be resolved in favor of the employee. Matthews v. Naylor, 42 Cal. App.2d 729, 109 P.2d 978; Employers' etc. Corp. v. Industrial Acc. Comm., 37 Cal.App. 2d 567, 99 P.2d 1089."

[3] However, petitioners contend that, because of the lack of evidence that Perguica knew the scaffolding was necessary, Walker's acts in connection with the transportation thereof were no concern of his, that they were done on Walker's own time, and therefore that they were not acts performed in the course of decedent's employment. In answering a similar contention the Supreme Court, in San Bernardino County v. Industrial Acc. Comm., 217 Cal. 618, 624, 625, 20 P.2d 673, 675, said: "Ordinarily, the purpose of the act of the employee out of which the injury arose, rather than the method of its performance, determines whether he was injured while within the course of his employment, unless the act, even though intended to forward the purpose of the employer, was of such an exceptional and unusual nature that it could not reasonably be said to be within the scope of the employment. Standard Lumber Co. v. Industrial Acc. Comm., 60 Cal.App. 331, 212 P. 720."

[4] Whether or not the need for a scaffold was discussed seems to be immaterial. The job of placing the wire netting on the house necessarily must have contemplated the use of scaffolding of some kind, and as none was upon the premises it became necessary either to build such equipment thereon or transport it thereto, prior to the commencement of the work. Walker's acts in doing either would be equally beneficial to his employer and equally essential to his employment. It therefore appears that in this regard the inference which the commission drew was entirely reasonable under the circumstances.

Nor do we find anything to the contrary in the cases cited and relied upon by petitioners: Postal Telegraph Cable Co. v. Industrial Acc. Comm., 1 Cal.2d 730, 37 P.2d 441, 96 A.L.R. 460; Holopoff v. Industrial Acc. Comm., 131 Cal.App. 554, 21 P.2d 649; Eby v. Industrial Acc. Comm., 75 Cal.App. 280, 242 P. 901. The first two are illustrative generally of the "going and coming" rule where the employee was acting primarily for his own benefit and not that of his employer, while the third case cited by petitioners, namely, Eby v. Industrial Acc. Comm., suggests the true rule applicable to the facts herein presented.

In the case of Goodrich v. Industrial Acc. Comm., 22 Cal.2d 604, 608, 140 P.2d 405, 407, the court, in reversing an order of the commission denying compensation to the dependents of one who was fatally injured while traveling from his place of employment to his home in order to discharge a duty which would further the interests of his employer, stated: "It has been said that even though an employee may be going to or from his place of employment on a mission personal to himself if he is also on a substantial mission of his employer which is the major factor in the movement, he may still be said to be within the course of his employment."

For the foregoing reasons the award is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

WEST KEY NUMBER SYSTEM

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76 Cal.App.2d 567

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION v. LUND et al.

LUND v. UNEMPLOYMENT RESERVES COMMISSION et al.

Civ. 13104.

District Court of Appeal, First District, Division 2, California.

Oct. 21, 1946.

Rehearing Denied Nov. 20, 1946.
Hearing Denied Dec. 19, 1946.

1. Taxation 🔑59

Former employees to whom garageman leased space to conduct automobile repair and paint business and sheet metal business at their own risk and without supervision by lessor, furnishing their own hand tools, parts, and supplies, were "independent contractors" and were not "employees" for whom lessor must make unemployment insurance contributions, though lessor received 50 per cent. of gross income weekly, could inspect books and control extension of credit, and lessees were required to repair all automobiles requested by lessor.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

2. Taxation 🔑59

Unemployment insurance contributions may be assessed only upon amounts paid to employees, and a principal for whom services are rendered by an independent contractor does not come within the scope of Unemployment Insurance Act.

3. Master and servant 🔑5

The important factor in determining whether one who performs service for another is an employee or independent contractor is the right to control manner and means of accomplishing the result desired, and if employer has authority to exercise complete control, regardless of whether such right is exercised with respect to all details, "employer-employee relationship" exists.

See Words and Phrases, Permanent Edition, for all other definitions of "Employer-Employee Relationship".

4. Master and servant 🔑6

Strong evidence in support of an employment relationship is the right to discharge at will without cause.

5. Master and servant 🔑5

Factors to be considered in determining whether employer-employee relationship exists are whether employee has a distinct occupation or business, whether work is usually done under direction or without supervision, skill required, who supplies the tools and place of work, length of time required, method of payment, whether work is a part of principal's regular business, and whether parties believe they are creating such relationship.

6. Judgment 🔑542

The defense of res judicata runs only to the judgment of a court of competent jurisdiction and does not apply to a body exercising administrative powers only.

7. Master and servant 🔑78

California Employment Stabilization Commission is an administrative body and has no judicial powers and its decisions are not res judicata.

8. Master and servant 🔑78

A determination of the California Employment Stabilization Commission that applicant is entitled to unemployment compensation benefits though supported by substantial evidence is not res judicata in action by employer to recover contributions paid under protest. Gen.Laws, Act 8780d, § 45.10.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action by California Employment Stabilization Commission, successor to California Employment Commission (formerly Unemployment Reserves Commission) against Roger C. Lund, individually, and doing business as Campus Garage, and others to recover unemployment insurance contributions, penalties and interest, and action by Roger C. Lund, doing business under the name and style of Campus Garage, against Unemployment Reserves Commission, California Employment Commission and Department of Employment of the State of California to recover taxes or contributions paid under protest. The actions were consolidated for trial and Roger C. Lund, etc., recovered in both actions on one judgment from which the Commissions appeal.

Judgment affirmed.

Robert W. Kenny, Atty. Gen., State of Cal., Clarence A. Linn, and Doris H. Maier, Deputy Attys. Gen., for appellants.

Crist & Beene, of Palo Alto, for respondents.

NOURSE, Presiding Justice.

Two actions were consolidated for trial —one brought by the Commission to recover contributions, penalties and interest, the other brought by Lund to recover taxes, or contributions, paid under protest. Lund recovered in both on one judgment and the Commission appeals on one record and one set of briefs.

Lund had been for a number of years the owner and operator of the Campus Garage in Palo Alto. He held the local agency for the Chrysler and Plymouth cars and maintained the garage as a storeroom and salesroom for these cars, for the storage or parking of cars generally, and for the servicing and repair of all cars brought in. The rear of the garage was set apart for the repair work and this space was divided into five stalls separated by fences or partitions and each containing benches and racks for the storage of tools and equipment of the individual workmen.

Prior to 1939 Lund managed the entire garage and employed mechanics to service and repair the cars brought in. During that year he had trouble with labor unions and abandoned the repair business. Some of his mechanics requested leave to rent space in the garage where they could operate the repair business independently. Leases were executed in March, 1939, which were superseded by others executed in November of that year. It is under these leases that respondent contends that these mechanics are independent contractors.

Taking the lease with R. E. Mailly, which is fairly typical of the others, we find these pertinent provisions: The lease covers stall "B" designated on the attached floor plan. The term is for one year with leave to the lessor to terminate at the end of a six months' period upon giving thirty days' written notice. The lessee engages to pay all taxes, license fees, and other charges levied against his equipment or in connection with the business. The lessee agrees to care for the property leased to him and to make all repairs and improvements at his own expense. "The lessee may conduct his business as he sees fit and none of the provisions of this lease shall be construed as reserving to lessor any right to exercise any control or management over the business or operations of the lessee, and neither lessee, nor any person performing any duties or engaged in any work at the request of lessee upon the leased premises, shall be an employee or agent of lessor." The lessee undertakes to hold the lessor harmless from all claims on account of injury to or death of any person, including his employees, and from all claims on account of injury to property arising out of the operation of the leased premises.

All these leases were entered into by the lessor at the request of the lessees. Three of the leases permitted use of the designated premises, or stalls, for the motor vehicle repair business, one for the motor vehicle paint business, and one for the sheet metal business. All these activities were operated independently of the lessor. The latter did not retain and did not exercise any control or supervision over the lessees. They came to work and left at any time they saw fit; they were permitted to accept such cars of their own customers as they desired and were alone responsible to the owners for repairs made; they hired employees to assist them and paid their wages; they limited their operations to the spaces covered in the respective leases; they made their own arrangements with their customers covering time and cost of repairs; they supplied their own hand tools, purchased parts and supplies as needed; they alone carried workmen's compensation to cover helpers employed by them; they were not paid by the hour, but were compensated wholly by the charges which they made to the customers.

Appellant cites as circumstances tending to show an employer relationship that all bills were made out on billheads furnished by the lessor; some heavy equipment on the premises owned by lessor was used by the lessees without charge to them; the lessees were required to repair all motor vehicles requested by the lessor; they could give no credit without the express consent of the lessor; they were required to pay weekly to the lessor fifty percent of the gross income; and their books were to be open to the inspection of the lessor. These are merely circumstances which might argue for a master and servant relation, but they are overcome by the other facts. Thus each of the lessees could employ each of the other lessees. The lessee would alone be liable to pay the compensation of the other lessee thus employed and to pay for his injury during the course of his employment. Each lessee was obliged to make good to the customer any damage arising out of poor workmanship.

On all the evidence the trial court found that the lessees were independent contractors and gave judgment for respondent in both cases.

[1-5] The judgment is in accord with all the recent authorities. Empire Star Mines Co. v. California Emp. Comm., 28 Cal.2d 33, 168 P.2d 686; Briggs v. California Emp.Comm., 28 Cal.2d 50, 168 P.2d 696; California Emp.Stab.Comm. v. Morris, 28 Cal.2d 812, 172 P.2d 497; California Emp. Stab.Comm. v. Gusmeroli, 75 Cal.App.2d 735, 171 P.2d 913; and California Emp. Stab.Comm. v. Wirta, 75 Cal.App.2d 739, 171 P.2d 728. In the Morris case, which is the last decided in point of time, the Supreme Court said: (28 Cal.2d at page 816, 172 P.2d at page 499) "The factors to be considered in making a determination as to whether, in a particular case, one performing services for another is an employee or an independent contractor have been fully stated by this court in recent decisions. Contributions to the Unemployment Insurance Act, it was held, may be assessed only upon amounts paid to employees; a principal for whom services are rendered by an independent contractor does not come within the scope of that legislation." One of the "recent decisions" is the Empire Star Mines Co. case. There the court, referring to these "factors", said: (28 Cal. 2d at page 43, 168 P.2d at page 692)

"In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without cause. California Emp.Comm. v. Bates, supra, [24 Cal.2d 432, 150 P.2d 192]; California Emp.Comm. v. Los Angeles etc. News Corporation, supra, [24 Cal.2d 421, 150 P.2d 186].

"Other factors to be taken into consideration are (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. (Rest., Agency, § 220; Cal.Ann. § 220.)"

The appellant does not question the decisive effect of the authorities cited, but it does not concede that those cases were correctly decided. Academically the argument is interesting. It may be that the lease arrangement was but a subterfuge to avoid the beneficent features of the Unemployment Act. On the other hand it is just as reasonable to assume that all parties were acting in good faith. Whatever the motive, the parties to this litigation followed the law as disclosed to them in the decisions of the reviewing courts and those issues must now be deemed "judicata".

[6-8] Appellant argues that since the decision of the administrative body that these lessees were in fact in the employment of respondent is supported by substantial evidence that "decision" should be "affirmed". Just what is meant by the statement is not clear. If the doctrine of res judicata is invoked the position is untenable. That defense runs only to the judgment of a court of competent jurisdiction. It does not apply to a body exercising administrative powers only. The Employment Commission has no judicial power. All these rulings were adverse to appellant in the Empire Star Mines case, 28 Cal.2d at page 33, 168 P.2d 686. Appellant cites and relies on Sipper v. Urban, 22 Cal.2d 138, 137 P.2d 425, Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304; and McDonough v. Garrison, 68 Cal.App.2d 318, 156 P.2d 983, all of which involved the hybrid proceeding of mandamus-certiorari to review an order of an administrative agency. It seems to be appellant's theory that the same judicial thinking should be applied to an ordinary suit to recover a tax paid under protest. Such action, however, is also a special proceeding authorized by section 45.10 of the Act, Deering's Gen. Laws 1939 Supp. Act 8780d, and the rule contended for by appellant was also rejected in the Empire Star Mines case.

Appellant finds some comfort in Twentieth Century Lites, Inc., v. California Dept. of Employment, 28 Cal.2d 56, 168 P.2d 699. The case was decided the same day as the Empire Star Mines and Briggs cases. The action was in mandamus to compel the Employment Commission to set aside its decision holding that operators of neon advertising signs were employees of the corporation. We find nothing in the Lites case contrary to those heretofore cited. Other matters do not require further consideration.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

WEST KEY NUMBER SYSTEM

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76 Cal.App.2d 481

HEDDING v. PEARSON et al.

Civ. 15105.

District Court of Appeal, Second District, Division 3, California.

Oct. 14, 1946.

1. Trial 🔑253(4)

In action for injuries sustained by a welder while working in a driveway when struck by defendant's truck, where conduct of welder was at most an assumption of risk of the type included within the law relating to contributory negligence, an instruction which in effect eliminated extent of plaintiff's knowledge of the danger and whether plaintiff was unreasonable in encountering the risk, and whether he failed to exercise due care under the existing conditions was error.

2. Automobiles 🔑219

One who is necessarily working on a highway or other place where there is vehicular traffic, and is injured through the negligent operation of a vehicle, cannot be deprived of his cause of action for damages upon the theory that he voluntarily assumed the risk of injury.

3. Automobiles ⚷246(30)

In action for injuries sustained by a welder while working in a driveway when struck by defendant's truck, where welder's assumption of risk, if any, was of the type relating to contributory negligence, instructions on subject of assumed risk should include a proviso that while a person assumes the perils which are naturally incident to the position he has taken, he does not assume dangers coming only from negligent acts of another.

4. Appeal and error ⚷1066

Where without the instruction given, the jury in light of the entire case might well have considered additional factors which were eliminated by the instructions and might have come to a different conclusion from that reached by them, instructions were prejudicial to plaintiff and required a reversal.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by Ralph D. Hedding against A. R. Pearson, doing business under the fictitious firm name of A. R. Pearson Truck Company, Dale Zentz, and others, for personal injuries. From an adverse judgment, plaintiff appeals.

Judgment reversed, and case remanded.

Arthur Garrett, of Los Angeles, for appellant.

Stanley N. Barnes, Richard T. Drukker, and Chase, Barnes & Chase, all of Los Angeles, for respondents.

KINCAID, Justice pro tem.

Plaintiff, appellant herein, brought this action for damages for personal injuries sustained by him through contact with a truck owned by defendant Pearson and operated by defendant Zentz as the employee of such owner. The defendants filed separate answers denying plaintiff's allegations of negligence and each set up the affirmative defense of contributory negligence on the part of plaintiff. The case was tried before a jury,which returned a verdict in favor of defendants, and from the resulting judgment plaintiff appeals.

The facts of the case are substantially without contradiction. Plaintiff was employed as a welder by Western Industrial Engineering Company. On May 31, 1943, he was directed by his foreman to perform welding work on a flat steel plate which was located in a driveway situated within the plant. The plate was so large that it extended entirely across the driveway and could not, because of its size and the crowded condition of the shop, be accommodated inside. Some 75 trucks passed through this driveway each day and plaintiff had been instructed to keep clear of such trucks when notified. Zentz, as a truck driver for Pearson, drove a truck owned by the latter to the plant of plaintiff's employer to deliver two large die castings. He signed in at the plant entrance and was directed to drive inside onto a driveway and he would be shown where to unload. He saw plaintiff lying on his side in the driveway, creating a bright light by welding something, when he first drove his truck there. He also saw plaintiff arise and step aside to let him pass, whereupon he drove his truck over the plate upon which plaintiff had been working. Upon resuming his work plaintiff was again instructed to desist in order to allow defendant's truck to back up. He stepped aside while the truck again crossed the plate in the driveway and stopped at the point where it was unloaded. Plaintiff then returned to his welding and for the succeeding 20 to 30 minutes continuously burned his bright welding arc except for brief periods while changing welding rods. After the die castings were unloaded, Zentz mounted his truck, started his motor and proceeded forward for the purpose of leaving the premises. After he had gone about 3 feet, according to Zentz, or about 20 feet according to the testimony of plaintiff, the truck came in contact with plaintiff. Zentz heard someone "holler" and stopped his truck. The first knowledge plaintiff had that the truck was about to move forward was when he heard the motor start, whereupon he rolled over backward in an attempt to elude the truck but it ran onto his legs. From the foregoing facts it is quite evident that Zentz knew, or in the exercise of reasonable care should have known, that at the time he started his truck to leave the premises plaintiff was working in the driveway in close proximity to the front of his truck.

The primary question presented by this appeal is whether prejudicial error occurred in the instructions to the jury concerning the law relative to the defense of assumption of risk as applied to the facts herein. After instructing the jury as to the matters of negligence and contributory negligence, the following were given:

"There is a legal principle commonly referred to by the term 'assumption of risk,' which now will be explained to you:

"One is said to assume a risk when he freely, voluntarily and knowingly manifests his assent to dangerous conduct or to the creation or maintenance of a dangerous condition, and voluntarily exposes himself to that danger, or when he knows, or in the exercise of ordinary care would know, that a danger exists in either the conduct or condition of another, or in the condition, use or operation of property, and voluntarily places himself, or remains, within the area of danger.

"One who thus assumed a risk is not entitled to recover for damage caused him without intention and which resulted from the dangerous condition or conduct to which he thus exposed himself."

"Your attention is called to a distinction between contributory negligence and assumption of risk. As said elsewhere in these instructions, contributory negligence must contribute in some degree, as a proximate cause, to the happening of the accident. But assumption of risk, if it meets with the requirements of the law as stated to you, will bar recovery for damage although it plays no part in causing the accident except merely to expose the person to danger."

It is the contention of plaintiff that the quoted instructions are incorrect statements of law, and, even if correct under proper facts and circumstances, are prejudiciously erroneous, incomplete and misleading as applied to the evidence in the instant case.

The defenses of assumption of risk and contributory negligence are often confused. "The distinction between the two types of defenses leads to important legal consequences." (Restatement, Torts, Vol. 4, p. 497.) As to assumption of risk, as distinguished from contributory negligence, American Jurisprudence (Vol. 38, pp. 845-7) states: "The principle that one who voluntarily assumed the risk of injury from a known danger is debarred from a recovery is recognized in negligence cases. * * * (A) plaintiff who, by his conduct, has brought himself within the operation of the maxim, 'volenti non fit injuria,' cannot recover on the basis of the defendant's negligence. In the words of the maxim as translated, 'that to which a person assents is not esteemed in law an injury.' Although there is authority for confining the doctrine of assumption of risk to cases arising out of the relation of master and servant, or at least to cases involving a contract relationship, it is now fairly well settled that the defense of assumed risk may exist independently of the relation of master and servant. The maxim, 'volenti non fit injuria,' applies in a proper case independently of any contract relation. It is said that one who knows, appreciates, and deliberately exposes himself to a danger 'assumes the risk' thereof. One cannot deliberately incur an obvious risk of personal injury, especially when preventive measures are at hand, and then hold the author of the danger for the ensuing injury. Thus, a person upon the property of another, who deliberately chooses to expose himself to danger of a patent character in the condition of the premises, which he could easily avoid with the exercise of care, may not hold the landowner liable for any resulting injuries, whatever may be the nature of his relationship to the landowner. * * *

"The defense of assumption of risk is closely associated with the defense of contributory negligence. One who does not exercise ordinary care for his own safety is said, speaking broadly, to assume the risk, that is, take the chance, of being hurt. The defense of assumption of risk is not incompatible with contributory negligence; the two defenses may arise under the same state of facts. * * * However, there is a clear distinction between the defense of assumption of risk and the defense of contributory negligence, notwithstanding they may arise under the same set of facts and may sometimes overlap. There is a line of demarcation which, if carefully scrutinized and followed, will allow the court to differentiate between them. Assumption of risk rests in contract or in the principle expressed by the ancient maxim, 'volenti non fit injuria,' whereas contributory negligence rests in tort. The former involves a choice made more or less deliberately and negatives liability without reference to the fact that the plaintiff may have acted with due care, whereas the defense of contributory negligence implies the failure of plaintiff to exercise due care. As stated in some decisions, assumption of risk is a mental state of willingness, whereas contributory negligence is a matter of conduct." See also 45 C.J. 1043; Landrum v. Roddy, 143 Neb. 934, 12 N.W.2d 82, 149 A.L.R. 1041.

[1, 2] The acts and conduct of the plaintiff herein, as reflected by the evidence, constituted at most an assumption of risk of the type included within the law relating to contributory negligence. Plaintiff's work compelled him to assume the position occupied by him at the time of the accident in question. As will be hereafter shown, the amount of care which he is compelled to exercise for his own safety under such conditions may well be less by reason of the necessity of his giving attention to his work than would otherwise be the case. *The facts as to the extent of plaintiff's knowledge of the danger, as to whether plaintiff was unreasonable in encountering the risk, and as to whether he failed to exercise due care under the existing conditions were matters which he was entitled to have considered and determined by the jury.* Instead, the jury was instructed as to a principle of law which is inapplicable to the facts, had the effect of eliminating these vital questions and of advising the jury that they might find for defendants, regardless of their wrongful conduct, so long as the injury to plaintiff was not intentionally caused by them. Such is not the law when applied to a factual situation such as is here presented. One who is necessarily working on a highway or other place where there is vehicular traffic, and is injured through the negligent operation of a vehicle, cannot be deprived of his cause of action for damages upon the theory that he voluntarily assumed the risk of injury. Under the circumstances of plaintiff's injury, the jury could well have understood the instructions as justifying a verdict for defendants upon mere proof that plaintiff knew, or should have known, that vehicles might come his way.

[3] If any instructions were to be given in this case on the subject of assumed risk, they should have further included a proviso that, while a person assumes the perils which are naturally incident to the position he has taken, he does not assume dangers which can come only from the negligent acts of another. Muskin v. Gerun, 1941, 46 Cal.App.2d 404, 410, 116 P.2d 105; 19 Cal.Jur. 589, sec. 30. In the case of Gornstein v. Priver, 1923, 64 Cal. App. 249, 221 P. 396, the plaintiff was one of a party riding in two hired trucks. She, with others, was sitting on the truck floor in such a manner that her legs hung over the rear end. The truck in which she was riding made a sudden stop for a street car. The second truck was following the first so closely as to be unable to stop and it collided with the rear of the first truck, resulting in injury to plaintiff's legs before she had a chance to withdraw them. To defendants' contention that they were completely absolved of any liability by reason of the position of peril in which she had voluntarily placed herself, the court replied that she did not assume the risk of danger created by the negligent operation of the trucks by the drivers, saying (64 Cal.App. at page 257, 221 P. at page 400): "[T]hough she assumed all the risks ordinarily incident to the position in which she seated herself on the truck, whether it was known to her to be dangerous or not—such risks, for example, as might be due to the ordinary and usual swaying of the truck or its ordinary and usual movements—still she did not forfeit her right to exact from defendant and his servants the same care to which she would have been entitled had she taken the safest seat on the vehicle." To the same effect, see Bee v. Tungstar Corp., 1944, 65 Cal. App.2d 729, 733, 151 P.2d 537; Kersten

v. Young, 1942, 52 Cal.App.2d 1, 9, 125 P.2d 501; Wilmot v. Golden Gate Investment Co., 1940, 41 Cal.App.2d 664, 668, 107 P.2d 263.

In several pertinent cases the refusal of the trial court to give proposed instructions on assumption of risk was held to be proper under the facts of each case. In Ostertag v. Bethlehem, etc., Corp., 1944, 65 Cal.App.2d 795, 151 P.2d 647, plaintiff was employed by an independent contractor doing electrical work in defendant's plant. At the direction of his foreman and of his immediate superior, Schnipper, he worked with the latter on the south wall of the building installing a cable. Two overhead tracks extended between the east and west ends of the building close to the north and south walls, upon which tracks ran an electrically driven crane. Work had been suspended for 3 days on the south wall but men had been working on the north wall in the meantime. Knowledge in the operator of the crane or his lookout as to plaintiff's presence at the time of the accident was a fact in dispute. Plaintiff and Schnipper noticed the crane in operation at the opposite end from where they were working. They worked facing each other and at Schnipper's direction plaintiff took a position with his back to the crane and with one foot on the crane rail. After a short time Schnipper saw the crane approaching, cried a warning resulting in the stopping of the crane, but not until it had crushed plaintiff. To the contention of defendant that the foregoing facts constituted a bar to recovery by plaintiff because of his voluntary assumption of the risk of injury, the court said (65 Cal.App.2d at pages 801, 802, 151 P.2d at page 650): "Respondent was a helper acting under the immediate direction of the journeyman Schnipper. At Schnipper's direction he was working with him in the place where he was injured. His work compelled him to assume a position with his back to the crane. The courts have often recognized that where a person must work in a position of possible danger the amount of care which he is bound to exercise for his own safety may well be less by reason of the necessity of his giving attention to his work than would otherwise be the case. Barboza v. Pacific Portland Cement Co., 162 Cal. 36, 40, 120 P. 767; Roddy v. American Smelting, etc., Co., 34 Cal.App.2d 457, 460, 461, 93 P.2d 841; Mecham v. Crump, 137 Cal.App. 200, 203, 204, 30 P.2d 568; Woods v. Wisdom, 133 Cal.App. 694, 696, 697, 24 P.2d 863; Jones v. Hedges, 123 Cal.App. 742, 752, 12 P.2d 111; Driscoll v. California St. R. Co., 80 Cal.App. 208, 215 et seq., 250 P. 1062. Whether or not respondent was guilty of contributory negligence on all the facts disclosed by the evidence was a jury question.

"On the claimed assumption of risk this case is not unlike Jones v. Hedges, supra, where the argument was made that the decedent, a workman on the highway who was struck and killed by an automobile driven into a dense cloud of smoke caused by hot oil being sprayed upon the pavement by a road construction crew of which decedent was a member, had assumed the risk of such injury. This court, in the Jones case, pointed out that the decedent was in the performance of his duties under the direction of his foreman and held that 'in a controversy between Jones or his heirs and a driver exercising ordinary care, Jones might be regarded as having assumed the usual risks incident to his employment; but he cannot be held to have assumed the risk of death through the *negligent propulsion* of an automobile upon him.' * * * Indeed it is unthinkable that a workman performing services for an independent contractor on the premises of another, under the direction of his superior and at the place where such services under the contract must necessarily be performed, should be held to have assumed the risk of injury by the negligent act of the owner of the premises or of the owner's agent or employee. As stated in DeGraf v. Anglo California Nat. Bank, 14 Cal.2d 87, 99, 100, 92 P.2d 899, 905:

" 'But, even conceding the applicability of the doctrine of "assumed risk" to the instant case, it is clear, with reference thereto that the determinative question was whether, in consideration of all the circumstances, plaintiff conducted himself as a reasonable and prudent person.'

"The refusal of the court to give appellant's proposed instructions on assumption of risk was proper under the facts of this case."

Another case to the same general effect wherein the refusal of the trial court to instruct the jury as to assumption of risk was upheld is Weaver v. Shell Co., 1939, 34 Cal.App.2d 713, 94 P.2d 364. There the plaintiff was employed at a gasoline filling station where the defendant, through its employee, was delivering a tank load of gasoline to its customer, plaintiff's employer. By reason of the claimed negligence of defendant an explosion occurred, the gasoline was ignited and plaintiff was burned. The court said (34 Cal.App.2d at pages 721, 722, 94 P.2d at page 369): "An instruction upon the doctrine of assumption of risk was proposed by appellants. The applicability of the doctrine is based upon the knowledge and appreciation of a danger and the voluntary occupation of a position of danger in disregard of the use of ordinary care. In this connection the time, the place, the person, and the relationship of the parties, should be considered. It is conceivable that one person may occupy with perfect safety a position that would be dangerous to another.

"In addition to cases involving the relationship of master and servant, the above doctrine has been invoked where some contractual obligation exists, such as the right upon payment of a fee to witness a performance or exhibition. Under such circumstances the doctrine is applicable to one who voluntarily assumes a position of danger (Quinn v. Recreation Park Ass'n, 3 Cal.2d 725, 46 P.2d 144); likewise to one who, without contract, knowingly participates in a hazardous undertaking such as riding on a fire engine making a test run (Grassie v. American LaFrance Fire Engine Co., 95 Cal.App. 384, 272 P. 1073), or attempting to ride an unbroken mule (Whalen v. Streshley, 205 Cal. 78, 269 P. 928, 60 A.L.R. 445). But in all cases the party must have knowledge of the existing conditions and must or should appreciate under all the surrounding circumstances the possibility of the danger involved and of the hazardous position assumed. Appellant Bodilly, as an employee of appellant Shell Company, had theretofore delivered gasoline under similar circumstances. Nothing had occurred from which could be drawn a reasonable inference that he would be negligent in the delivery on the day in question. Decedent was not an employee of the defendant Shell Company, nor a fellow employee of the defendant Bodilly. In view of the legal doctrines above referred to, the trial court was justified in refusing to give the proposed instruction." See also Pollard v. Foster, 1942, 54 Cal.App.2d 502, 505, 129 P.2d 448; Graff v. United Railroads of San Francisco, 1918, 178 Cal. 171, 176, 172 P. 603; Roberts v. Sierra Railway Co., 1910, 14 Cal.App. 180, 115 P. 519, 527.

[4] Since the instructions which were given the jury on the subject of assumption of risk by the plaintiff were inapplicable to the facts in this case, the giving of them was improper. Without them the jury, in the light of a consideration of the entire case, might well have taken into consideration the additional factors, previously alluded to and italicized, and have come to a different conclusion from that reached by them. Such being the case, they were prejudicial to the plaintiff's cause and constitute grounds for reversal. Aurenz v. Los Angeles Ry. Corp., 1937, 19 Cal.App.2d 401, 403, 65 P.2d 910; Aurenz v. Los Angeles Ry. Corp., 1939, 35 Cal.App.2d 615, 617, 96 P.2d 397; Scandalis v. Jenny, 1933, 132 Cal.App. 307, 313, 22 P.2d 545; Buttrick v. Pacific Electric R. Co., 1927, 86 Cal.App. 136, 139, 260 P. 588.

The judgment is reversed and the case remanded for a new trial, appellant to recover his costs on appeal.

DESMOND, P. J., and SHINN, J., concur.

76 Cal.App.2d 406

STALLMAN et ux. v. SCHWARTZ et al.

Civ. 15251.

District Court of Appeal, Second District,
Division 1, California.

Oct. 9, 1946.

1. Corporations 🔑121(5)

Evidence sustained findings that plaintiffs negotiated directly with defendant, that defendant falsely represented that stock was worth a certain amount, that corporation had a valuable contract, that corporation was a going business concern and would make profit, that plaintiffs relied upon such representations, and that plaintiffs rescinded and demanded return of investment.

2. Corporations 🔑117

In determining right to cancel note and mortgage and to obtain return of money paid for stock, seller's representation that if buyer would invest a certain sum he would be secured amounted to representation that stock was worth the amount of the investment or more.

3. Fraud 🔑11(1)

Where seller of stock possessed or assumed to possess superior knowledge regarding the matter of representation as to condition of the corporate business, which knowledge was not equally open to buyers of the stock, what might otherwise be regarded as an expression of opinion might amount to an affirmation of fact. Civ.Code, § 1710.

4. Fraud 🔑20

Courts are inclined to hold that one can act upon assumption that there exists no intention to cheat or defraud him.

5. Licenses 🔑39

In action to cancel note and mortgage and to obtain return of money paid for stock, evidence sustained finding that no payment of cash or its equivalent was made for the original issue of the stock of corporation and that original issue having been made in violation of terms of permit granted by Commissioner of Corporations, sale thereof was void. Gen.Laws, Act 3814.

6. Licenses 🔑39

An action for money had and received will lie to recover money paid to individual or corporation for issuance of corporate securities when such issuance is in violation of Corporate Securities Act. Gen.Laws, Act 3814.

7. Mortgages 🔑78

Cancellation of note and mortgage for misrepresentation in sale of stock was not improper on ground that such instruments not only secured purchase money for stock sold by defendant but also secured money that was loaned by defendant to plaintiffs to pay for stock purchased by them from another, where agreement for sale of such other's stock was between him and defendant evidenced by written instrument, plaintiffs' dealings were directly with defendant, and mortgage and note were in possession of defendant at time of trial.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Timothy John Stallman and his wife against John N. Schwartz and another to recover money paid for stock and to cancel a note and deed of trust. From a judgment for plaintiffs, first named defendant appeals.

Affirmed.

Entenza & Gramer, and John J. Craig, all of Los Angeles, for appellant.

Walter E. Egerman, of Los Angeles, for respondents.

WHITE, Justice.

By their complaint filed herein plaintiffs alleged that on or about July 23, 1944 defendant through the medium of false and fraudulent representations induced them to purchase one and one-third shares of the capital stock of Air Utilities Corporation, which one and one-third shares represented one-third of the total stock issued by said corporation. It was further alleged that as consideration for the purchase of said stock plaintiffs paid to defendant the sum of $5,000 consisting of $1,500 in cash and a promissory note for $3,500 secured by a deed of trust on certain real property. The complaint further alleged that in addition to the foregoing plaintiffs made to defendant three payments of $35 each or a total of $105 on account of the above note and trust deed.

Defendant's answer contains a general and specific denial of plaintiffs' charges of fraud and misrepresentation, as well as a denial that plaintiffs gave to defendant the sum of $1,500 or any sum of money whatsoever.

Trial before the court resulted in a judgment for plaintiffs from which defendant John N. Schwartz prosecutes this appeal.

Epitomizing the facts which gave rise to this litigation, we find in the record evidence that defendant and three others were the incorporators of Air Utilities Corporation, organized under the laws of the State of California. A permit to issue stock was granted by the Division of Corporations of California authorizing the issuance of four shares thereof for $10 per share. Only four shares were issued, of which the defendant held one. Another share was held by one William Hargrave. Defendant is the brother-in-law of plaintiff Mr. Stallman, the latter's sister being married to the former. According to the plaintiffs' testimony, the defendant and his wife called at their home, where defendant represented to plaintiffs that the corporation's business was being hampered by the actions of Mr. Hargrave, one of the incorporators; that defendant could not trust him and desired to bring about his retirement from the business; that defendant stated, "If you come into this firm, we could perfect a better feeling between us, and we could get along. We have a $91,000 contract here, and the potential profits will exceed $50,000. * * * If you can raise $5,000 and come into the business, you are secured; you don't have to worry a minute, because you will get one-third of the profits of the contract; and * * * it has been a going business right along, and this is an opportunity for you."

Plaintiff Mr. Stallman further testified concerning his conversation with the defendant as follows: "He said for $5,000 I could get one and a third shares, which would constitute one-third of the ownership of the corporation stock. I said, 'Johnny, I haven't got $5,000.' He said, 'Well, you've got a Buick car, a good car, and it would bring a big price.' He said, 'You can sell that to pay up what cash you can, and I'll take a second mortgage on your property.' He also said, 'The stock is well worth over that amount.' Another objection I raised—I said, 'I am a pie-man; I have been on the job a good many years, and I don't know anything about that kind of a job.' He conceded the fact that Mr. Hargrave was a very good machinist. He said, 'He's an awfully good machinist, and a good promoter. The only trouble is, I can't trust him; and since we have that feeling, we can't get together.'"

Subsequently, plaintiff Mr. Stallman sold his automobile for $1,200, borrowed $300 from a finance company, executed the aforesaid promissory note and trust deed, and delivered the cash and documents to the defendant, receiving therefor the one and one-third shares of capital stock in the aforesaid corporation.

Appellant's sole contention on appeal being that several of the findings are not supported by the evidence, it is unnecessary to here narrate more of the testimony in detail. It will be referred to as we consider the respective findings against which appellant directs his attack.

[1-4] It is first contended that finding IV to the effect "that all of plaintiffs' negotiations, transactions, dealings and purchase of one and one-third (1-⅓) shares of stock * * * were made directly between plaintiffs and defendant" is not supported by the evidence. In this regard, appellant asserts that a reading of the contract of sale and purchase of the stock in question will show that the sale of such stock was between defendant and Hargrave as vendors and plaintiff Mr. Stallman as purchaser. There is, however, in the record substantial evidence that all representations of and concerning the stock were made by defendant to plaintiff Mr. Stallman, and in answer to a question, "How much were you going to pay Mr. Hargrave?" plaintiff Mr. Stallman testified, "I wasn't going to pay Mr. Hargrave anything, so far as I was concerned; he only entered into the agreement

through the arrangement he (Hargrave) had with Mr. Schwartz. He demanded $2,500 in cash from Mr. Schwartz."

There was also introduced into evidence, as an exhibit, the agreement for the transfer and sale of Mr. Hargrave's stock. This document conclusively shows that the stock was purchased from Mr. Hargrave by the defendant and paid for by the defendant with his personal check.

Finding V, subdivision (1), "that defendant John N. Schwartz, represented to plaintiffs that a certain one and one-third (1-⅓) shares of the common stock of a corporation known as Air Utilities Corporation, a California corporation, was worth in excess of Five Thousand ($5,000.00) dollars book value", is challenged on the ground that the same is not supported by the evidence. This claim is without merit. There is positive testimony in the record that in a conversation between plaintiff Mr. Stallman and defendant, the latter stated, "* * * We have a $91,000 contract here, and the potential profits will exceed $50,000. It you can raise $5,000 and come into the business, you are secured; you don't have to worry a minute, because you will get one-third of the profits of the contract; and, it has been a going business right along and this is an opportunity for you." The representation that if plaintiff would invest $5,000 he would be secured is sufficient to amount to a representation that the stock was worth the amount of the investment or more.

There is abundant evidence in the record to support the finding that the defendant represented to plaintiffs that the corporation had a $91,000 contract for work to be done by it, and contrary to appellant's contention the court did find that such representation was untrue and that the falsity of such representation was not discovered by plaintiff Mr. Stallman until shortly prior to the filing of this action.

Appellant assails as not supported by the evidence, the court's findings that the defendant represented "that said corporation was a going business concern and in a very solvent condition", and "that said one and one-third shares of stock representing a total of one-third of the capital stock of the corporation, would net to the plaintiffs, for their investment of $5,000, a total profit in excess of $50,000".

As to the first above-quoted finding, the very testimony referred to by appellant supports such finding. We refer to the testimony wherein defendant was quoted as saying, "We have a fine business here and the potential profits will exceed $50,000" and "it has been a going business right along, and this is an opportunity for you". Appellant argues that such evidence "is nothing more than sales talk or the expression of an opinion". But the case at bar presents a situation wherein the defendant possessed, or assumed to possess, superior knowledge regarding the matter of the representations as to the condition of the business, and which knowledge was not equally open to plaintiff. Therefore, what might otherwise be regarded as an expression of opinion may amount to an affirmation of fact. Eade v. Reich, 120 Cal.App. 32, 35, 7 P.2d 1043. When one suggests as a fact that which is not true, when he does not believe it to be true, such conduct amounts to deceit. Civil Code, sec. 1710. And, as was said in Togni v. Taminelli, 11 Cal.App. 7, 14, 103 P. 899, 902, "No one has a right, either in law or in morals, to complain because another has placed too great reliance upon the truth of what he himself has stated". The law does not require that a person must assume that everyone with whom he has a business transaction is a rogue and act accordingly. Courts are, therefore, inclined to hold that one can act upon the assumption that there exists no intention to cheat or defraud him, or as was said in Tracy v. Smith, 175 Cal. 161, 165, 165 P. 535, 537, "the fraudulent vendor cannot escape from liability by asking the court to applaud his fraud and condemn his victim for his credulity".

Concerning the last above-mentioned finding, it may be said that the same is supported by ample evidence and reasonable inference deducible therefrom. For instance, the defendant represented to plaintiff Mr. Stallman that "we have a $91,000 contract and the potential profits will exceed $50,000 * * * you (the plaintiff Mr. Stallman) will get one-third of the profits of the contract". This was not, as contended by appellant, "merely sales talk" but amounted to fraud and deceit because, first of all, the corporation did not have $91,000 in contracts but only approximately $79,000 in purchase orders, which was known to the defendant, while the condition of the business was such that the trial court was justified in concluding, as it did, that the defendant was aware that the corporation was not a "going business concern and in a solvent condition"; that the corporation did not have $91,000 in contracts, and that defendant knew plaintiffs would not realize anything like a profit of $50,000 on their $5,000 investment.

Appellant's contention that the court's finding that certain false and fraudulent representations were made by defendant to the plaintiffs; that plaintiffs relied upon such representations, and by reason of such reliance paid to defendant the sum of $5,000 in cash and by way of a trust deed and promissory note is not supported by the evidence is without merit. Testimony hereinbefore narrated amply supports the questioned finding.

Contrary to appellant's claim, there is substantial evidence to support the findings that "said stock was worthless"; that the original stockholders, including defendant, paid nothing for their stock and that such stock was issued contrary to the terms of the permit granted by the California Commissioner of Corporations and therefore was a void sale of stock. The fact that the corporation was adjudicated a bankrupt in the United States District Court on February 10, 1944, was the strongest kind of evidence of the worthlessness of the stock at that time, while other competent and material evidence hereinbefore referred to, warranted the conclusion by the court that the stock was worthless at the time it was sold by defendant to the plaintiff Mr. Stallman.

[5, 6] With reference to the claimed legality of the original sale of stock, appellant asserts that the court's finding that no money was paid for such stock in conformity with the permit issued by the Commissioner of Corporations, is "absolutely contrary to the evidence for the evidence shows conclusively that the $10 cash per share was paid by the defendant for the stock". This contention can not be sustained. With reference to any actual payment being made for the stock originally issued, defendant testified, "I mean the original stock was issued for the four stockholders who started the corporation, free gratis. * * * I didn't pay any money for the stock." Further testimony reiterating this was given by the defendant. Subsequently, during the trial after the noon recess defendant sought to change his testimony by stating that $10 was paid by each of the four incorporators for such stock; that the payments were made in cash, but as to what fund such payments were credited to, defendant testified, "I don't know, but I think it was petty cash." On re-cross-examination, when asked if he recalled his previous testimony given at the morning session of court, the defendant's answer was, "Not completely". For the purpose of impeaching the defendant's testimony, it was established that he had previously been convicted of a felony, the essence of which was fraud. In this state of the record the court was justified in finding that no payment of cash or its equivalent was made for the original issue of the four shares of capital stock of the corporation, and that the original issue of stock, having been made in violation of the terms of the permit granted by the Commissioner of Corporations, the sale thereof to plaintiffs was void. An action for money had and received will lie to recover any money paid to an individual or corporation for the issuance of corporate securities when such issuance is in violation of the Corporate Securities Act, Gen. Laws, Act 3814. Ramirez v. Thomas Products, Ltd., 10 Cal. App.2d 338, 340, 51 P.2d 895.

The court's finding "that in truth and in fact at the time of such representations, the said corporation was in the process of having its ninety-one thousand ($91,000) dollar contract cancelled" is supported by the testimony of plaintiff Mr. Stallman that "several weeks after I was in the organization, the outside man of the Western Industrial Engineering Company came in one day—* * *. I found out definitely they were cancelling the contract, and that it had been under consideration for cancellation for quite a few weeks * * *".

The same reasons which justified the court's finding that the stock was worthless, and the finding that the corporation, "instead of making any money at any time whatsoever, was actually at all times losing money", supported the finding last above quoted.

The finding that plaintiff Mr. Stallman did rescind and demand the return of his investment finds support in the following testimony given by said plaintiff:

"Q. About what time of month was it? A. It was on Sunday, I would say the early part of January.

"Q. What was said between you and Mr. Schwartz? A. Mr. Schwartz said several times to me that I didn't have to worry about the mortgage; that he wouldn't foreclose it. So I said to him, 'Mr. Schwartz, if you will give me back the mortgage on my property, you can have the $1,500,' and he said, 'Absolutely not; I'll foreclose on you and sue you.' And I said, 'I'll sue you, then, if that's the way you feel about it,'—and that was this court action that was brought."

[7] There is no merit to appellant's final contention that the court erred in ordering cancellation of the promissory note and trust deed. Appellant's argument in this regard is grounded on the claim that such instruments not only secured the purchase money for the stock sold by the defendant Schwartz, but in addition secured the $1,000 that was loaned by defendant to plaintiffs to pay on the stock purchased by them from Mr. Hargrave. But Mr. Hargrave did not sell his stock to the plaintiffs. As heretofore pointed out, the agreement for the sale of Hargrave's stock was between him and defendant, evidenced by a written instrument which was introduced into evidence. As plaintiff Mr. Stallman testified:

"Q. So that actually you were given $1,000 by Mr. Schwartz in order to complete the transaction, were you not? A. No, Mr. Schwartz put that $1,000 up of his own accord to make the deal possible for Mr. Hargrave to get his one-half out in cash."

There is ample and substantial evidence that plaintiffs' dealings were all directly with the defendant and both the trust deed and promissory note in question were in the possession of the defendant at the time of trial. Therefore, that portion of the judgment ordering cancellation of such documents was proper.

For the reasons herein stated, the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

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76 Cal.App.2d 515

PEOPLE v. PHILLIPS.

Cr. 2393.

District Court of Appeal, First District, Division 2, California.

Oct. 17, 1946.

1. Criminal law 🔑1159(4)

The credibility of a witness and weight to be given his testimony are issues solely for the jury or trier of facts, and only where testimony relied on by prosecution is so inherently improbable as to amount to no evidence at all is an appellate court authorized to reverse a judgment of conviction.

2. Criminal law 🔑1159(4)

Contradictions in testimony of a witness for the state in a criminal prosecution do not render the testimony "inherently improbable" within meaning of rule that, when testimony relied on by the prosecution is so inherently improbable as to amount to no evidence at all, an appellate court can reverse a judgment of conviction.

See Words and Phrases, Permanent Edition, for all other definitions of "Inherently Improbable".

3. Criminal law 🔑742(1)

In prosecution for conspiracy to bribe a pugilist to induce him not to use his best efforts in boxing match, and for violations of statute making such bribery a felony, credibility of pugilist, who testified for the state, and weight to be given his testimony, were issues for jury, though pugilist had perjured himself previously with respect to the boxing match before the boxing commission. Pen.Code, § 337b.

4. Bribery 🔑11
Conspiracy 🔑47

Evidence sustained convictions for violating and conspiring to violate statute making it a felony to offer a bribe to a participant in a boxing match, etc., for which admission is charged. Pen.Code, § 337b.

5. Statutes 🔑64(6)

One who was not indicted under statute until approximately four years after the act became effective as an emergency measure could not attack the constitutionality of the act on grounds that it was passed as an emergency measure when no emergency existed, since, if no emergency existed or urgency declarations in act were invalid, that would not impair the validity of the remainder of the act which would take effect at the regular time appointed by law. Const. art. 4, § 1.

6. Statutes 🔑107(3), 118(6)

Act entitled "An act to amend sections 337b, 337c, 337d and 337e of, and to add Section 337f to, the Penal Code, relating to crimes in connection with sporting events, contests and exhibitions, including horse racing, baseball, football, boxing and wrestling, declaring the urgency of this act, to take effect immediately", does not violate the section of the Constitution providing that every act shall embrace but one subject which shall be expressed in its title. Pen.Code, § 337b; St.1941, p. 1031; Const. art. 4, § 24.

7. Statutes 🔑109

Where body of act embraces provisions germane to the general subject stated in the title, or where the title suggests the field of legislation which is included within the text of the act, the title is sufficient. Const. art. 4, § 24.

8. Statutes 🔑109

The title of an act should be liberally construed so as to uphold the act if a reasonable reference to the subject matter included therein may be ascertained from the language employed. Const. art. 4, § 24.

9. Statutes 🔑109

The title need not embrace every detail of a statute or catalog contents of statute. Const. art. 4, § 24.

10. Criminal law 🔑1035(3)

Where no complaint was made by defendant in trial court during any of the proceedings, or on motion for a new trial, to the effect that he was deprived of counsel, objection raised for first time on appeal that defendant was prejudicially deprived of counsel, while jury was being instructed and when verdict was returned, presented no error.

11. Criminal law 🔑858(3)

Court properly sent into jury room, as requested by jury, records of air line and telephone companies which had been admitted in evidence.

12. Criminal law 🔑1039

Objections to court's action in permitting records of air line and telephone companies, which had been admitted in evidence, to go to jury room, were improperly raised for the first time on appeal.

13. Criminal law 🔑755½

Trial judge may comment on the evidence as a whole, provided that comment is fair and temperate, and he may indicate that the evidence is in conflict.

14. Criminal law 🔑784(4)

Giving of instruction that there was a substantial conflict in the evidence and that, if jury was unable to determine where the truth really lay, then jury must resolve the doubt in favor of the defendants, and that defendants should only be convicted if the case was free from reasonable doubt, was not error.

15. Criminal law 🔑984

Where one count of indictment alleged that defendant offered pugilist on February 18 a certain sum of money if pugilist would not use his best efforts in boxing match, and another count charged that defendant offered the pugilist a different sum of money on February 22 to induce the pugilist not to use his best efforts in same boxing match, each act constituted a separate violation of the statute and was punishable as such. Pen.Code, § 337b.

16. Criminal law ⚷1028

Plea of double jeopardy not entered in trial court was waived and could not be raised on appeal.

17. Bribery ⚷16
Conspiracy ⚷51

One convicted of violations of and conspiracy to violate the statute making bribery of a participant in a sporting event a felony, and providing for punishment of imprisonment in a state prison for a period not exceeding five years, or by a fine not exceeding $5,000, or by both fine and imprisonment, was improperly sentenced to county jail. Pen.Code, §§ 182, 337b.

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Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Abe Phillips was convicted of conspiracy to violate statute making it a felony to offer a participant in a sporting event, for which admission is charged, a bribe with the understanding that the participant will not use his best efforts, and of two violations of that statute, and he appeals, and the state moves to dismiss the appeal.

Motion to dismiss appeal denied, and judgment affirmed and cause remanded for sentence.

Reed M. Clarke, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., and Norman H. Elkington, Asst. Dist. Atty., both of San Francisco, for respondent.

NOURSE, Presiding Justice.

On May 11, 1945, appellant Abe Phillips and Charles Kelso, also known as Charles Kelson, were charged by an indictment containing three counts with a conspiracy to violate section 337b of the Penal Code and with offers and attempts to bribe under that code section. The first count covered the conspiracy charge, setting forth three overt acts, and the second and third counts alleged separate violations of section 337b, covering the offer of bribes to Willie Carter, also known as Jackie Cooper, a pugilist, to induce him not to use his best efforts to win a boxing contest with his opponent, Freddie Dixon.

The prosecution's principal witness, Jackie Cooper, testified to the following facts: He arrived in San Francisco on February 11, 1945, to commence physical training for a professional boxing contest against Freddie Dixon scheduled for February 22, 1945. Cooper registered at a hotel catering to colored guests and at which his opponent was also staying. A day or two after his arrival at the hotel Cooper encountered defendant Kelson, a trainer, whom he had met in the past. Kelson told him that Freddie Dixon was going to lose the fight and that he would give Cooper all of the details upon his return from a trip to Los Angeles. On about February 15, 1945, Cooper met Kelson for the second time in the hotel lobby and asked if Dixon were still "in the bag to lose the fight." Kelson told him to wait until he had talked with defendant Phillips who was then en route to the hotel. Cooper and Kelson thereupon walked to the outside of the hotel and when Phillips drove up Kelson went over to talk with him privately. Subsequently Kelson came back to where Cooper was standing and stated that Phillips would give him $1000 to lose the first two rounds of the contest so that during the fight the betting odds would shift to Dixon who had been "fixed" to lose in the eighth round. Cooper agreed to accept the $1000 but refused to accept a bribe of $4000 to lose the contest entirely. After talking with Phillips again Kelson stated that the former would have the $1000 for Cooper on the following Monday. On that day Cooper received a telephone call from a person asking him to meet defendant Phillips outside of the hotel. Upon Phillips' arrival Cooper got into the automobile and the two drove a short distance and stopped. During the ensuing conversation Phillips stated that since Cooper had become a favorite to win the contest he would be unable to give him the $1000 to lose the first two rounds but that he would give him five or six thousand dollars to lose the fight entirely. Cooper refused to accept the bribe even though Phillips telephoned to him later about the offer. On the morning of the contest Kelson met Cooper in the hotel and after a short conversation asked him to wait in his room. Kelson returned to the room in a few minutes and stated that Phillips was downstairs and would give Cooper $7000 to lose the contest. The witness testified that he also refused this offer.

That night the contest was stopped in the seventh round and Cooper, who admitted that he not put forth his best efforts in the first two rounds, was disqualified. Cooper returned to his hotel and subsequently went with a friend, Freddie Alexander, to Kelson's room for a gathering which included defendants Phillips and Kelson. The latter two men berated Cooper on the ground that he had "messed up everything" and told him that he had been a "sucker" for refusing the money to lose the fight. Alexander corroborated this portion of Cooper's testimony. Cooper further testified that when the boxing commission decided to investigate the contest he went to defendant Phillips' place of business, a dance hall, where he discussed the situation with Phillips who instructed him to tell the commission that he had not taken a bribe and not to mention any names. One of Phillips' employees wrote down for Cooper the essence of what he should tell the commission. A few days subsequent to the boxing commission's hearing one of Phillips' friends gave Cooper $100 to leave the city. On cross-examination Cooper freely admitted that his testimony before the commission to the effect that he had fought his best and that no bribe had been offered to him was perjured but insisted that his testimony at the trial was true.

Appellant Abe Phillips testified that he did not know defendant Kelson, that he had not been in the latter's room and that he at no time offered a bribe to Cooper. Kelson denied that he had talked with Cooper at any time before the fight and denied knowing Phillips personally prior to the trial of this case. In the face of the defendants' denials the district manager of passenger service for an airline company testified from business records that in February Phillips made a reservation for Kelson for a flight between San Francisco and Los Angeles, and a telephone company agent testified from business records that telephone calls between San Francisco and Los Angeles had been made between the defendants on dates prior to the boxing contest.

On the basis of the evidence summarized above the jury found Kelson and Phillips guilty on each of the three counts of the indictment. The trial court denied defendants' motion for new trial and for probation and entered a judgment on the verdicts. Phillips was sentenced to the county jail for the term of one year, one day suspended on probation, on counts one and two, the terms to run concurrently; he was fined $1000 on count three. Phillips appeals from the judgment and from the order denying his motion for a new trial. The State has filed a motion "for dismissal of appeal with direction to return the cause to the trial court for entry of proper judgments under counts one and two of the indictment;" the motion has been submitted with the appeal.

[1-4] Appellant Phillips argues that the evidence was so inherently improbable that it was insufficient as a matter of law to support the judgment. It is contended that the testimony of Cooper was lacking in credibility and in view of the fact that he perjured himself before the boxing commission his testimony could not be accepted as evidence in the trial court. We cannot agree with these arguments. The credibility of a witness and the weight to be given to his testimony are, of course, issues solely for the jury or trier of facts. People v. Marble, 8 Cal.2d 139, 141, 64 P.2d 135; People v. Voice, 68 Cal.App.2d 610, 614, 157 P.2d 436; People v. Santora, 51 Cal.App.2d 707, 711 and 712, 125 P.2d 606. It is only where the testimony relied upon by the prosecution is so inherently improbable as to amount to no evidence at all that an appellate court is authorized to reverse a judgment (People v. Stephens, 66 Cal.App.2d 755, 757, 152 P.2d 1019; People v. Moreno, 26 Cal.App.2d 334, 336, 79 P.2d 390), and contradictions or inconsistencies in the testimony of a witness do not render it inherently improbable within this rule.

People v. Carlisle, 66 Cal.App.2d 874, 876, 153 P.2d 401; People v. Moreno, supra. Hence here the credibility to be given to Cooper's testimony was a matter for the determination of the jury. It was supported by the testimony of Freddie Alexander as well as the testimony of the air lines and telephone company agents. In view of the explanation that the bribes were offered to influence betting odds during the course of the contest the evidence cannot be said to be improbable in any sense. A reading of the record compels the conclusion that the conviction of the appellant was supported by substantial, even overwhelming, evidence and should not be disturbed. People v. Simpson, 66 Cal.App.2d 319, 327, 152 P.2d 339; People v. Guttmann, 10 Cal.App.2d 490, 491, 52 P.2d 495; People v. Hooper, 10 Cal.App. 2d 332, 335, 51 P.2d 1131.

[5-9] It is contended by the appellant that section 337b of the Penal Code, Stats. 1941, ch. 80, p. 1031 under which he was convicted, is unconstitutional for the following two reasons: (1) The statute was passed as an urgency measure when no emergency existed and no facts showing any reason for giving the statute immediate effectiveness were set forth in the act, and (2) the title when analyzed in connection with the subject matter of the statute relates to more than one subject in violation of the provisions of section 24 of Article IV of the Constitution of California. In answer to the first of these contentions it should be noted that the statute in question was enacted in 1941 as an amendment to section 337b of the Penal Code then in effect. The code section which at that time pertained solely to baseball was broadened to include "any sporting event, contest, or exhibition of any kind whatsoever, where admission is charged," making the offering, giving or attempting to give any player money, bribe or thing of value with the intention, understanding or agreement that the participant would not use his best efforts a felony. Section 4 of the act declared it to be an urgency measure to take effect immediately, but the sufficiency of such statement of facts under section 1 of Article IV of the Constitution cannot be attacked by the appellant herein. The code section became effective as an urgency measure on April 4, 1941, approximately four years before appellant was indicted. Under the general rule if no emergency existed or the urgency declaration were invalid that would not impair the validity of the remainder of the statute which would take effect at the regular time appointed by law. Riley v. Carrico, 110 P. 738, 740; 50 Am.Jur. 514; 59 C.J. 1146, 1147. California cases are in accord with this principle. Michelson v. City of Sacramento, 173 Cal. 108, 109, 159 P. 431; In re Hoffman, 155 Cal. 114, 120, 99 P. 517, 132 Am.St.Rep. 75; Morgan v. City of Long Beach, 57 Cal.App. 134, 139, 207 P. 53. Hence here in any event the statute became effective "ninety days after the final adjournment of the session of the Legislature which passed such act" (sec. 1 Art. IV, California Constitution) and is not subject to this type of attack by the appellant at this late date. The second ground upon which appellant bases his contention that section 337b is unconstitutional is also without merit. Section 24 of Article IV of the Constitution provides: "Every Act shall embrace but one subject, which subject shall be expressed in its title." The title of the statute involved on this appeal reads as follows: "An act to amend Sections 337b, 337c, 337d and 337e of, and to add Section 337f to, the Penal Code, relating to crimes in connection with sporting events, contests and exhibitions, including horse racing, baseball, football, boxing and wrestling, declaring the urgency of this act, to take effect immediately." Stats.1941, Ch. 80, page 1031. The appellant's argument is answered by the recent decision in People v. Oreck, 74 Cal.App.2d 215, 168 P.2d 186 (petition for transfer denied) wherein a similar challenge to section 337a of the Penal Code was made and the court held (74 Cal.App.2d at page 222, 168 P.2d at page 191): "Where the body of the act embraces provisions germane to the general subject stated in the title, or when the title suggests the field of legislation which is included within the text of the act, the title will be held to be sufficient. People v. Jordan, 172 Cal. 391, 156 P. 451. The title should be liberally construed so as to uphold the statute if a

reasonable reference to the subject matter included therein may be ascertained from the language employed. Hecke v. Riley, 209 Cal. 767, 290 P. 451; Pierce v. Riley, 21 Cal.App.2d 513, 70 P.2d 206. It is not necessary to embrace in the title every detail of the enactment. It is not necessary that the title should catalogue the contents of the statute. People v. One Ford V8 Tudor Sedan, 12 Cal.App.2d 517, 55 P.2d 908; People v. Buyle, 20 Cal.App.2d 650, 68 P.2d 268. Tested by these standards the title is clearly sufficient." The statute involved herein does not include more than one subject because all the included matters require the same kind of regulation and all matters contained in the act relate to the general subject expressed in the title. 23 Cal.Jur. 646 and cases there cited.

[10] Appellant argues that he was prejudicially deprived of counsel while the jury was being instructed and at the time the verdict was returned and that as a result the trial court had no jurisdiction to pronounce judgment. In view of the record the contention requires little discussion. Appellant's attorney on this appeal was substituted for Joseph A. Brown who represented Phillips during the trial of the action. The clerk's transcript shows that the appellant was represented by counsel at all times and the only indication that Mr. Brown may not have been present at the time that the jury was instructed is found in the reporter's transcript which shows that a Mr. Mann stipulated that the jurors were present and waived written instructions on behalf of Phillips. The record shows that subsequent to the recordation of the verdicts and at the time that the defendants were arraigned for judgment the appellant's attorney, Mr. Brown, stated he had heard that the court's instructions were "very fair." No complaint was made in the lower court during any of the proceedings or on motion for a new trial to the effect that Phillips was deprived of counsel and there is no merit to this objection raised for the first time on appeal.

[11, 12] Appellant argues that the trial court committed error in permitting the records of the air line and telephone companies to go to the jury room because the latter record showed telephone messages from Phillips to certain musicians whose names might cause the jury to gain the impression that they were gamblers. The record shows that after several hours' deliberation the jury requested the court to send the exhibits to the jury room. As stated above appellant was represented by counsel whose sole objection was that only certain of the exhibits were offered in evidence. The court thereupon sent to the jury all of the exhibits "marked in evidence." This was not error. People v. Descant, 51 Cal.App.2d 343, 349, 124 P.2d 864; People v. Walther, 27 Cal.App.2d 583, 593, 81 P.2d 452. The present objections are improperly raised for the first time on appeal and no prejudice has been shown by the trial court's action.

[13, 14] Appellant next objects to an instruction wherein the court in effect told the jury that there was a substantial conflict in the evidence. The challenged instructions continued with the following: "if you are unable to determine where the truth really lies, then you must resolve the doubt in favor of the defendants. The defendants in this case should only be convicted if the case is free from a reasonable doubt in your minds under the evidence and the instructions of the Court." The instructions in this case, including the one under attack herein, were full and fair. The jury was instructed on all of the necessary elements of the offenses charged and the rights of appellant were fully protected. It is well settled that the trial judge may comment on the evidence as a whole providing such comment is fair and temperate (People v. Patubo, 9 Cal.2d 537, 542, 71 P.2d 270, 113 A.L.R. 1303; People v. De Moss, 4 Cal.2d 469, 476 and 477, 50 P.2d 1031; People v. King, 30 Cal.App.2d 185, 205, 85 P.2d 928), and that he may indicate that the evidence is in conflict. People v. Un Dong, 106 Cal. 83, 88 and 89, 39 P. 12; People v. Flynn, 73 Cal. 511, 516, 15 P. 102; 53 Am.Jur. 476. In view of the state of the evidence in this case the instruction was not error.

[15, 16] Appellant finally argues that the court had no authority to sentence him under the third count of the indictment after having sentenced him on the second count because both counts relate to the same single and continuing offense, and hence they can be the subject of but one penalty. The record does not support this contention. The second count of the indictment alleged a violation of section 337b of the Penal Code on February 18, 1945, and the third count alleged a violation on February 22, 1945. The evidence showed that the offers of bribes involved two different sums of money offered on different days; one offense was completed and an interval of several days elapsed before the second act occurred. Under such circumstances each act constituted a separate and distinct violation of the statute punishable as such. No plea of double jeopardy or double punishment was entered in any stage of the proceedings before the trial court hence the plea is waived and cannot be raised for the first time on appeal. In re Harron, 191 Cal. 457, 467 and 468, 217 P. 728; 7 Cal. Jur. 995 and 996, and cases there cited.

We conclude that the conviction of appellant finds ample support in the record and should be sustained, and that the order denying appellant's motion for new trial should be affirmed.

Respondent moves to dismiss the appeal with direction to return the cause to the trial court for entry of proper judgments on the first and second counts of the indictment on the ground that a jail sentence was imposed in violation of the mandate of the statute. Section 337b of the Penal Code expressly provides that its violation is a felony punishable "by imprisonment in the State prison for a period not exceeding five years, or by a fine not exceeding five thousand dollars ($5,000), or by both such fine and imprisonment." Section 182 of the Penal Code provides that if two or more persons conspire "to commit any felony, * * * they shall be punishable in the same manner and to the same extent as * * * provided for the punishment * * * of the said felony * * *."

[17] In the instant case the appellant was sentenced on the conspiracy charge of the first count of the indictment and on the independent violation of section 337b of the Penal Code charged in the second count to "* * * imprisonment in the County Jail of the City and County of San Francisco, State of California, for the term of One (1) year, One Day suspended on probation * * *, Count No. Two (2) term to run concurrently with term imposed in count No. One (1). * * *" Since a motion for probation was denied by the trial court, for appellant admitted that he had been convicted of a prior felony (sec. 1203, Penal Code) and as the court made no reference of the matter to the probation officer for his investigation and report as required by section 1203 of the Penal Code (People v. Lopez, 43 Cal.App.Supp. 2d 854, 861, 110 P.2d 140), it cannot be assumed that the court granted probation on the condition that Phillips serve the sentence to the county jail. Therefore, it must be held that a judgment was actually rendered rather than reserved during a probationary period. In view of the mandate of section 337b of the Penal Code requiring that the sentence be either imprisonment in the state prison or a fine, or both, the trial court was without authority to impose a jail sentence on the second count of the indictment; under section 182 of the Penal Code read in connection with section 337b the imposition of a jail sentence on the first count was also unauthorized. People v. Superior Court, 135 Cal. App. 562, 27 P.2d 670; People v. Superior Court, 116 Cal.App. 412, 2 P.2d 843.

The motion to dismiss the appeal is denied. The judgment is affirmed and the cause remanded to the Superior Court of the State of California in and for the City and County of San Francisco, to arraign the appellant Abe Phillips for sentence according to law.

GOODELL and DOOLING, JJ., concur.

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STATE et al. v. DAY et al.

Civ. 12975.

District Court of Appeal, First District, Division 1, California.

Oct. 18, 1946.

1. Evidence 🔑54, 595

Unless mandatory presumptions are prescribed by statute, and in the absence of a question of law, court or jury must deduce an inference from a fact legally proved, or on a reasonable deduction based on such fact in conformity with the ordinary propensities or passions of men generally or of the particular person involved, and the deduction may be founded on the course of business or of nature. Code Civ. Proc. §§ 1958, 1960, 2061, 2101.

2. Appeal and error 🔑996

Inferences which reasonably may be drawn from the evidence, and which are legally admissible notwithstanding that a contrary inference might be drawn by an appellate court, must be accepted on appeal as evidence in favor of the prevailing party.

3. Evidence 🔑589

In action by state and State Compensation Insurance Fund against manager of state compensation insurance fund and attorney for the fund for alleged misapplication of money from the fund and for a conspiracy to misapply the money, trial court had the right to disbelieve any testimony of the manager favorable to the attorney.

4. Conspiracy 🔑19
Workmen's compensation 🔑1076

In action by the state and State Compensation Insurance Fund against manager of the fund and attorney for the fund for alleged misapplication of money from the fund and for conspiracy to misapply the money, evidence sustained finding that attorney took part in the alleged misapplication and conspiracy and that he was jointly responsible with the manager for damages suffered by the fund. Civ.Code, § 2343, subd. 3.

5. Conspiracy 🔑14

Each participant in the wrongful conspiracy is responsible as a joint tort-feasor for all damages ensuing from the wrong irrespective of whether or not he was a direct actor and regardless of the degree of his activity.

6. Conspiracy 🔑13

Attorney for State Compensation Insurance Fund, who was found to be a conspirator with manager of the fund to misapply moneys from the fund, was equally liable with manager for the wrong perpetrated, though attorney may not have known the details of the scheme from its inception.

7. Appeal and error 🔑878(6)

Where respondents did not appeal from judgment against appellant, they could not urge on appellant's appeal that the judgment against him should have been greater.

8. Appeal and error 🔑882(1)

On appeal by attorney for State Compensation Insurance Fund from a judgment against him for alleged misapplication of moneys from fund and for conspiracy to misapply the moneys because of wrongful allowance of commutation of a compensation award and a lump-sum payment to claimant, attorney could not complain that plaintiffs offered no evidence tending to show the amount for which the claim should have been commuted, since a wrongdoer must bear the risk of the uncertainty which his own wrong has created.

9. Appeal and error 🔑756, 761

Where no citations were given and no argument was presented by appellant in support of contention on appeal, matter complained of would be deemed to have been without prejudice to appellant's rights.

10. Interest 🔑60

Generally, interest may not be computed on accrued interest unless by special statutory provision, or by stipulation of the parties, and in the latter event the amount may not be fixed in conflict with statutory provisions. Gen.Laws, Act 3757; Const. art. 20, § 22.

11. Interest 🔑60

Only simple interest at legal rate and not compound interest could be charged against attorney for the State Compensation Insurance Fund for alleged misapplication of money from the fund and for conspiracy to misapply the money. Gen.Laws, Act 3757; Const. art. 20, § 22.

12. Interest ⚷39(1)

The allowance of interest in a fraud case prior to judgment is in the trial court's discretion.

13. Interest ⚷39(4)

In action by state and the State Compensation Insurance Fund against attorney for the fund for alleged misapplication of money from the fund and for conspiracy to misapply the money, trial court in its discretion properly determined that interest on judgment against attorney should begin from the date when the state was deprived of the money.

14. Interest ⚷49

In action by the state and State Compensation Insurance Fund against attorney for the fund for alleged misapplication of money from the fund and for conspiracy to misapply the money, interest on judgment against attorney should have been fixed as continuing until date of payment of judgment rather than until date of order for preparation of findings and judgment.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by the State of California and the State Compensation Insurance Fund against C. B. Day, also known as Clark B. Day, Carroll S. Bucher, and others, for alleged misapplication of money of the State Compensation Insurance Fund, and for an alleged conspiracy. From a judgment in favor of the plaintiffs, Carroll S. Bucher appeals.

Judgment ordered modified and, as modified, affirmed.

A. Dal Thomson, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and Carl W. Wynkoop, Deputy Atty. Gen., of San Francisco, for respondents.

WARD, Justice.

This action was instituted against C. B. Day and Carroll S. Bucher for alleged misapplication of money of the State Compensation Insurance Fund (hereinafter referred to as the Fund), and Massachusetts Bonding and Insurance Company, a corporation, as surety on a bond which is conditioned upon any designated act of wrongful abstraction, or willful misapplication, etc., of the funds of the Fund. A second cause of action is based upon an alleged conspiracy founded upon the facts alleged in the first case of action. Judgment was entered for the plaintiffs.

Defendant Day and the bonding company have not appealed, but a chronological statement of the acts of both Day and Bucher—those of the former commencing in 1936, and those of the latter not until a few days subsequent to January 27, 1937—is necessary to understand the participation of Bucher. Such a recital is also necessary to a statement and understanding of the position taken by the respective parties on the appeal. The findings are lengthy but they succinctly narrate the necessary facts as to Day and Bucher. There is evidence to support the findings against Day. If the trial court disbelieved Bucher, then there is substantial evidence against him. If credence should be given to his sworn statements, then the sufficiency of the evidence is, to say the least, problematical. Certain findings sustained by the evidence will be quoted, and excerpts of evidence given verbatim or in substance to indicate that the court's findings and judgment, insofar as they apply to Bucher, are substantially upheld by the evidence.

The pertinent findings applicable to the appeal by Bucher which are supported by evidence which may be declared substantial, appear as follows:

"1. Plaintiff State Compensation Insurance Fund is, and at all times herein mentioned was, a fund created by law and an agency of the State of California.

"2. C. B. Day, also known as Clark B. Day, was the duly appointed, qualified and acting Manager of said State Compensation Insurance Fund from December 1, 1934, to February 17, 1939. * * *

"5. On November 30, 1934, said C. B. Day, as principal, and said Massachusetts Bonding and Insurance Company, a Corporation, as surety, executed, gave and delivered to State Compensation Insurance Fund an official bond for said C. B. Day, as Manager of said State Compensation Insurance Fund. * * *

"9. The condition of said bond was broken in this, that said C. B. Day while holding his said office and purporting to act in official discharge of certain duties appertaining thereto committed certain acts which did constitute acts of fraud, dishonesty, theft, wrongful abstraction or wilful misapplication in relation to the funds of State Compensation Insurance Fund and which acts were not in the faithful performance of the duties of said office and were in fact contrary to and in fraud of the rights of State Compensation Insurance Fund all as hereinafter set forth at length. * * *

"13. Each of said schedule bonds Nos. 41979 and 37149 was, during its said respective effective period, the official bond insuring State Compensation Insurance Fund against the wrongful acts of all employees of said State Compensation Insurance Fund, including said Carroll S. Bucher, and were conditioned alike and subject to the same terms and binding for the same breaches and as to the same class of persons. * * *

"18. During all the times hereinafter mentioned said C. B. Day and said Carroll S. Bucher, together with one Richard T. Hamilton, were officers and stockholders in the Tru-sheen Corporation, a corporation.

"19. One Clinton H. Resau was at one time an employee of the Gilro Machine and Stamping Co., a corporation, which said company during said employment was insured under a Workmen's Compensation Insurance policy of State Compensation Insurance Fund.

"20. Said Clinton H. Resau was and had been a very close friend of said C. B. Day for about fourteen or fifteen years prior to 1936, had gone on fishing trips with said C. B. Day nearly every year for twelve years during said time, and for a few years prior to and during 1936 had had dinner with said C. B. Day about once a week, accompanied by their respective wives and alternately visiting each other's home.

"21. Said Clinton H. Resau had been ill for several years, and early in 1936 he mentioned to said C. B. Day the fact that he thought his illness might be due to his work and that he thought he might be suffering from silicosis, whereupon said C. B. Day told said Clinton H. Resau he would be glad to have him sent to a doctor.

"22. On and immediately prior to February 6, 1936, said C. B. Day, while occupying said office of Manager of State Compensation Insurance Fund, advised and encouraged said Clinton H. Resau to file with State Compensation Insurance Fund a claim for compensation for an alleged industrial injury alleged to have been sustained while said Clinton H. Resau was in the employ of said Gilro Machine and Stamping Co., a corporation.

"23. Said claim of Clinton H. Resau, after said Clinton H. Resau had been given a medical examination by a physician selected by State Compensation Insurance Fund, was rejected as a compensable injury or condition.

"24. Following said rejection of the claim filed by said Clinton H. Resau, said C. B. Day, while still acting as Manager of State Compensation Insurance Fund, on March 26, 1936, procured the filing by said Clinton H. Resau with the Industrial Accident Commission of an application for adjustment of said claim; and said C. B. Day, despite being Manager of State Compensation Insurance Fund, acted throughout the matter of said claim including its procurement and the subsequent award based thereupon, solely and exclusively in the interests of said Clinton H. Resau, and to further satisfy the personal interests of said C. B. Day, as hereinafter more fully appears.

"25. When said claim was filed with said Industrial Accident Commission it became the legal duty of said C. B. Day to thoroughly investigate the facts relative thereto or to cause the same to be investigated, and to ascertain or cause to be ascertained whether the same was an allowable claim or whether it should be rejected; and whether, if and when a petition for adjustment of said claim should be filed with said Industrial Accident Commission the allowance or such claim should be resisted; but that said C. B. Day failed to properly or sufficiently investigate the said claim or to cause the same to be investigated, and by various means, including specific instructions to subordinates in the employ of State Compensation Insurance Fund as to the manner of handling said claim, and also including the failure to make a full and complete disclosure to the Industrial Accident Commission of all the known facts in reference to said claim, induced and secured the allowance of an award to said Clinton H. Resau upon said claim by the said Industrial Accident Commission.

"26. Said C. B. Day accomplished the said allowance of said claim by means of the following acts in particular: Said C. B. Day told those of his subordinate employees of State Compensation Insurance Fund who were assigned to act upon said claim that said Clinton H. Resau was a personal friend of his, and that he believed the said Clinton H. Resau had suffered a compensable injury; said C. B. Day had said Clinton H. Resau kept under medical observation and had further medical examinations made until a report favorable to the allowance of said claim was had; said C. B. Day kept out of the record submitted to said Industrial Accident Commission any medical evidence other than that which was favorable to the granting and allowance of said claim, and in particular in this connection instructed the [then] attorney assigned to protect the interests of State Compensation Insurance Fund at the hearing before said Industrial Accident Commission to refrain, and said attorney did refrain, from raising any issue in the proceedings as to the occupational connection of the alleged injury or illness which was the basis of said claim, and this despite the fact that, but for the actions of said C. B. Day in the normal handling of said claim, the same had been rejected by the Claims Department of State Compensation Insurance Fund as not having any industrial connection; and said claim would have remained rejected but for the said acts of said C. B. Day, all of which acts were contrary to and inconsistent with the usual practice adhered to by the State Compensation Insurance Fund and were designed by C. B. Day to and did influence and contribute to the granting of an award to said Clinton H. Resau; for said claim was in fact a questionable one in that the industrial nature of the alleged injury upon which said claim was based was highly controversial and would ordinarily have been carefully investigated and examined by State Compensation Insurance Fund and the said Industrial Accident Commission, and allowance of said claim would have been seriously contested by State Compensation Insurance Fund but for the said acts of said C. B. Day and the said acts of said C. B. Day did prevent a full and fair hearing of said claim upon its merits, and but for said acts of said C. B. Day said claim would have been rejected by said Industrial Accident Commission; and all of the said acts of said C. B. Day were done to the neglect of and were inconsistent with the official duties of said C. B. Day, and were in breach of his official bond, contrary to the interests of State Compensation Insurance Fund and to the damage of State Compensation Insurance Fund.

"27. Said award of said Industrial Accident Commission was made on April 20, 1936, and was in favor of said Clinton H. Resau for the sum of Eighty-eight and 92/100 Dollars ($88.92), payable forthwith, and Twenty-two and 23/100 Dollars ($22.-23) per week commencing April 18, 1936, said weekly payments to continue during continuance of disability.

"28. Thereafter, and on June 25, 1936, said Industrial Accident Commission made its further order fixing a permanent disability rating for said award as follows: Twenty-two and 23/100 Dollars ($22.23) per week, beginning March 21, 1936, until two hundred and forty (240) weekly payments should have been made, and thereafter Thirteen and 68/100 Dollars ($13.68) per week for the remainder of the natural life of said Clinton H. Resau.

"29. Pursuant to the said award and the several orders aforesaid of the said Industrial Accident Commission, State Compensation Insurance Fund paid to said Clinton H. Resau, and on account of said award and order, a total of One Thousand Two Hundred Nine and 02/100 Dollars ($1209.02), of which amount One Thousand Forty-four and 81/100 Dollars ($1044.81) was paid out in indemnity payments and One Hundred Sixty-Four and 21/100 ($164.21) was paid out on account of medical services and expenses incurred by State Compensation Insurance Fund on account of said Clinton H. Resau.

"30. In the latter part of January, 1937, said C. B. Day further induced said Clinton H. Resau to apply to State Compensation Insurance Fund and to said Industrial Accident Commission, and said Clinton H. Resau did so apply for a commutation of the said award and orders to a lump sum payment, and by and with the assistance and advice of said Carroll S. Bucher, who had become counsel of State Compensation Insurance Fund on January 27, 1937, secured the granting of said commutation by said Industrial Accident Commission; said acts of said C. B. Day and said Carroll S. Bucher were done in the interests of and because of the friendship of said C. B. Day with said Clinton H. Resau, and also for the personal advantage of said C. B. Day and in order to furnish said Clinton H. Resau with sufficient money to invest in said Tru-Sheen Corporation, a corporation.

"31. Upon the filing by said Clinton H. Resau of said application for commutation of award, by virtue of their said official positions, it became the duty of both C. B. Day and said Carroll S. Bucher to thoroughly investigate the same, or cause the same to be investigated, and to weigh the advisability of approving or resisting the same and to make a recommendation respecting the granting or denial of said application to said Industrial Accident Commission; but both and each of them failed and neglected to either investigate said application or cause the same to be investigated, or to consider the possibility of resisting it or to resist it, and, on the contrary, forthwith approved and caused the same to be approved and hurried through, and made every effort to have the same granted by said Industrial Accident Commission.

"32. A proper or any investigation of the facts would have disclosed that at the time said application for commutation was filed the said Clinton H. Resau could be expected to live but a short time, that the aneurism of the abdominal aorta might rupture at any time causing immediate death, and that the life expectancy of said Clinton H. Resau was further impaired by reason of an amputated leg.

"33. Shortly prior to February 8, 1937, the said C. B. Day ascertained or caused to be ascertained from Robert E. Haggard, superintendent of the permanent disability rating bureau of said Industrial Accident Commission, the value of a commutation of the life pension awarded said Clinton H. Resau; upon ascertaining said commutation value, said C. B. Day instructed said Carroll S. Bucher, who just a few days before had been appointed by said C. B. Day to be Chief Counsel of State Compensation Insurance Fund, to prepare a stipulation authorizing said Industrial Accident Commission to make a commutation of said permanent disability rating and life pension; in furtherance of said commutation said C. B. Day consulted with Frank McDonald, one of the duly appointed, qualified and acting Commissioners of said Industrial Accident Commission and assured him that the said Clinton H. Resau and his wife would never become public charges of the State of California if the said Industrial Accident Commission should grant said commutation; it was further represented to the Commissioner Frank McDonald that upon the granting of said commutation said Clinton H. Resau and his wife would go back East to make their home with a brother of said Clinton H. Resau.

"34. Pursuant to said instructions of said C. B. Day, said Carroll S. Bucher prepared a stipulation authorizing said Industrial Accident Commission to commute said permanent disability rating and life pension; said stipulation was dated February 8, 1937, was filed with said Industrial Accident Commission the same day, on the same day the said Industrial Accident Commission made and issued its order granting said commutation, and on the same day a check in full payment of said commutation was executed and delivered to said Clinton H. Resau.

"35. Said stipulation authorizing said commutation was handled exclusively by said C. B. Day and said Carroll S. Bucher; the usual and regular procedure followed by State Compensation Insurance Fund in the handling of such matters was not followed; the request for commutation was not submitted to the committee established to pass upon such requests; the matter was not referred to the Claims Department for review and recommendation; and the said Carroll S. Bucher, as Chief Counsel of said State Compensation Insurance Fund, did not consult with any other member of the Legal Department of said State Compensation Insurance Fund nor did he refer said stipulation to the attorney who had previously handled proceedings in said Clinton H. Resau case before said Industrial Accident Commission; rather the entire matter regarding said stipulation was handled exclusively by the said C. B. Day and said Carroll S. Bucher, without the knowledge or consent of any other employee of State Compensation Insurance Fund, despite the fact that said C. B. Day had never known of a similar instance of a commutation of a 100% permanent disability rating and life pension.

"36. In presenting said stipulation to said Industrial Accident Commission the said C. B. Day and said Carroll S. Bucher did not advise said Industrial Accident Commission of any circumstances which did or would tend to reduce the life expectancy of said Clinton H. Resau, even though at the time of filing said stipulation with said Industrial Accident Commission the said C. B. Day and Carroll S. Bucher knew that said Clinton H. Resau had had one leg amputated and that he might suffer a rupture of said aneurism at any time causing immediate death; further, said C. B. Day and said Carroll S. Bucher did not have said Clinton H. Resau examined medically to determine at the time said stipulation was filed with said Industrial Accident Commission whether there had been any change in or what was the life expectancy of said Clinton H. Resau, nor did the said C. B. Day or said Carroll S. Bucher take any steps to see that the best interests of State Compensation Insurance Fund were protected therein.

"37. Through the efforts of said C. B. Day and said Carroll S. Bucher and solely by reason thereof and by reason of representations made by them to said Industrial Accident Commission the said application was commuted to cash by said Industrial Accident Commission.

"38. Pursuant to said commutation, on or about February 8, 1937, State Compensation Insurance Fund paid to said Clinton H. Resau the sum of Six Thousand Nine Hundred Sixty-two and 56/100 Dollars ($6962.-56) in full satisfaction of said award and in commutation thereof.

"39. On or about February 10, 1937, said Clinton H. Resau paid out of the said commutation payment of Six Thousand Nine Hundred Sixty-two and 56/100 Dollars ($6962.56), the sum of Two Thousand Four Hundred Dollars ($2400.00) in a cashier's check made payable to said R. T. Hamilton. Said cashier's check was endorsed by said R. T. Hamilton and said C. B. Day, cashed, and the proceeds placed in a safe deposit box which the said C. B. Day, said Carroll S. Bucher, and said R. T. Hamilton thereupon rented under an agreement whereby said safe deposit box could be opened only in the presence of at least two of said three persons.

"40. Thereafter the said Clinton H. Resau made further payments of One Thousand Dollars ($1000.00) on April 22, 1937, and Two Thousand Dollars ($2000.00) on May 21, 1937, making a total sum paid by said Clinton H. Resau to said C. B. Day, said R. T. Hamilton, and said Carroll S. Bucher of Five Thousand Four Hundred Dollars ($5400.00).

"41. Said commuted lump sum of Six Thousand Nine Hundred Sixty-two and 56/100 Dollars ($6962.56) was greatly in excess of the aggregate of any weekly indemnity payments which it reasonably could be expected said Clinton H. Resau would be entitled to under the previous said award, to the knowledge of said C. B. Day and said Carroll S. Bucher and each of them, but in spite of said knowledge said C. B. Day and said Carroll S. Bucher and each of them approved and agreed to said application and caused the same to be approved and agreed to in violation of their respective duties and in breach of their said bonds and contrary to the interests of State Compensation Insurance Fund, and to the damage of the State Compensation Insurance Fund."

The findings continue upon practically the same facts as previously stated and set forth that a conspiracy was formed about February 6, 1936, with "other persons unknown" to do the alleged wrongful acts and to refrain from performing certain official duties. Bucher's connection with the alleged conspiracy is fixed as of the date he became counsel for the State Compensation Insurance Fund in the latter part of the month of January, 1937.

The findings further provide: "47. It was the purpose and object of said C. B. Day and said Carroll S. Bucher at that stage of the conspiracy to obtain the commutation for said Clinton H. Resau in order to put said Clinton H. Resau in possession of money that he would then loan or give or turn over to said C. B. Day or said Carroll S. Bucher for the purpose of financing said Tru-Sheen Corporation, a corporation, of which corporation said C. B. Day and said Carroll S. Bucher were then officers." There is also evidence that a day or two following the payment of the commuted award Day requested Bucher to meet him at a bank in San Francisco. It there developed that Resau was loaning part of the award to the Tru-Sheen company in which Day and one Hamilton owned stock, and Bucher, the attorney and secretary-treasurer, had been paid in shares of stock for legal services rendered. The money advanced by Resau was not deposited with a bank but was placed in a safe deposit box, which could only be opened by any two of the three parties mentioned.

In the narrative statement of the evidence, certified by the trial judge as a "full and correct narrative statement of the testimony taken, and the evidence adduced, at the trial," appears, as part of the testimony of appellant, Bucher, the following:

"I next heard of Mr. Resau a few days after the commutation. That was in connection with the safe deposit box transaction. Mr. Day telephoned me to come down to the Angelo Bank at the corner of McAllister and Market Streets. I wen down there and met Mr. Day and also Mr. Hamilton. Mr. Day told me that they had borrowed some money from Mr. Resau and he then, for the first time, called my attention to the fact that Mr. Resau was the man for whom a commutation had been made, that the Tru-Sheen Corporation had borrowed this money from Mr. Resau and that they desired to put it in the safe deposit box in the Bank. I asked him why they were putting it in the safe deposit box and he said there was a man who was the manager of the Company who would be inclined to pay the money out more rapidly than it should be. The safe deposit box was opened in the names of all three of us, with any two to have access to it.

"I had nothing to do with the notes that were given to Mr. Resau for the loans. I never saw Mr. Resau at any time."

According to Day, when Resau received the check Mrs. Resau was physically ill and Resau determined that he would not go east—though eventually they journeyed to Resau's brother's home in the City of Baltimore. According to Day, Resau wanted to invest part of the money in securities that would return an income.

There is evidence that Bucher had never met Resau personally at any time during the various transactions, or knew anything about the industrial accident claim. Bucher was directed by Day within a short time after his appointment as counsel for the Fund to prepare a commutation of award. The directions were followed and Bucher, as attorney for the Fund, signed the stipulation. Where an application for commutation is presented by stipulation its passage or approval by the Industrial Accident Commission is automatic if the referee of the Industrial Accident Commission is satisfied after an examination of the file that it complies with Labor Code, sec. 5100. In this case the referee of the Industrial Accident Commission not only approved the commutation but had the statistician fix the amount, whereupon the referee prepared the order, which was duly approved by the commission.

There is some evidence that Day told officials and employees of the Fund that Resau was his friend. Bucher did not deny that this information was given him, but stated in that regard that he could not remember. Whether the preparation of the stipulation of commutation by Bucher was an act that should have put Bucher on guard against a misapplication of funds is a question of fact. Bucher had twenty-five or more years of experience in the practice of industrial cases. There is evidence that the usual practice was to refer all commutations exceeding $500 to a committee to examine, and make recommendations to the manager of the Fund, and that life pension cases were few in number. There is also evidence that the "committee" was not in existence, and other evidence that various officials and employees of the Fund did not remember whether it existed at the time of the Resau commutation transaction.

[1, 2] The rules necessary to establish the quantum of proof of fraud or a conspiracy are stated in Campbell v. Birch, 19 Cal.2d 778, 789, 122 P.2d 902, 908, as follows: "The trial court is the exclusive judge of the weight of the evidence and the credibility of the witnesses. It is its province to give to the evidence that weight to which, in its judgment, it is entitled, and to draw all reasonable inferences therefrom, and if, in its judgment, the evidence is entitled to no weight it may disregard such evidence altogether. (24 Cal.Jur. 886, § 135.) The cases have frequently taken notice of the fact that it is next to impossible to secure direct evidence of a conspiracy, unless one of the participants has confessed, and that the proof must usually be inferential and circumstantial." In People v. Yant, 26 Cal. App.2d 725, 737, 80 P.2d 506, 511, the court said: "It is not often that the direct fact of an unlawful agreement which is the essence of a conspiracy can be proved otherwise than by the establishment of independent facts bearing upon the common design; and the question as to the existence of the conspiracy being one of fact, it is sufficient if the circumstances proved satisfy the jury, leaving the weight and sufficiency of the evidence to the triers of the questions of fact. People v. Sampsell, 104 Cal.App. 431, 439, 286 P. 434." See, also, Johnstone v. Morris, 210 Cal. 580, 292 P. 970; Revert v. Hesse, 184 Cal. 295, 193 P. 943; People v. Kauffman, 152 Cal. 331, 92 P. 861; Beeman v. Richardson, 185 Cal. 280, 196 P. 774. The trial court heard all of the evidence covering the securing of the commutation and the loan to a company in which Bucher held stock. Appellant contends that there is insufficient evidence to establish any wrongdoing on his part. The trial court evidently disbelieved his testimony. "In determining the disputed questions of fact presented at the trial of the case it was the province of the jury to disbelieve any testimony which appeared to them to lack verity. They were the exclusive judges of the credibility of the witnesses and the weight to be given their testimony. They could reject positive testimony and accept circumstantial evidence as proof of the facts, as it is elementary that direct evidence may be disbelieved and contrary circumstantial evidence relied upon to support a verdict or finding." Gray v. Southern Pacific Co., 23 Cal.2d 632, 640, 641, 145 P.2d 561, 566. Unless mandatory presumptions are prescribed by statute, and in the absence of a question of law, it is the duty of the court or jury (Code Civ.Proc., secs. 2101, 2061) as the case may be, to deduce an inference from a fact legally proved (Code Civ.Proc., sec. 1958), or on a reasonable deduction based on such fact in conformity with the ordinary propensities or passions of men generally or of the particular person involved. The deduction may also be founded on the course of business or of nature. Code Civ.Proc., sec. 1960. "From the secrecy with which unlawful undertakings are adopted, it would be generally impossible to make such proof by direct testimony. Evidence is indirect as well as direct, consisting of inferences and presumptions, and it is code law that upon the trial of a case evidence may be given

of any facts from which the facts in issue are presumed or are logically inferable." People v. Donnolly, 143 Cal. 394, 398, 77 P. 177, 179. Inferences which reasonably may be drawn from the evidence and which are legally admissible notwithstanding that a contrary inference might be drawn by an appellate court, must be accepted on appeal as evidence in favor of the prevailing party. The inference drawn by the trial court may not be the inference which the individual members of this court might draw. "The fact that some inference other than that which has been drawn by a jury may appear to an appellate tribunal to be the more reasonable, affords no sufficient reason for disturbing the inference in question. 10 Cal.Jur., p. 735, et seq. It also appears to be well-established law that notwithstanding the fact that the evidence upon which the inference is founded is undisputed or without conflict, an appellate court has not the power to draw an inference different from that which the jury has deduced." Juchert v. California Water Service Co., 16 Cal.2d 500, 508, 106 P.2d 886, 891. See, also, Mah See v. Northern American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 26 A.L.R. 123; Webster v. Board of Dental Examiners, 17 Cal.2d 534, 110 P.2d 992; Hamilton v. Pacific Elec. Ry. Co., 12 Cal.2d 598, 86 P.2d 829; Barham v. Widing, 210 Cal. 206, 291 P. 173; Arques v. National Superior Co., 67 Cal.App.2d 763, 155 P.2d 643; Palmer v. Palmer, 49 Cal.App.2d 331, 121 P.2d 822.

The trial court, with the above rules in mind, could consider the long standing friendship between Day and Bucher; the fact that Bucher was selected by Day from three names submitted by the personnel board for appointment as chief counsel for the Fund; Bucher's long experience with the particular class of work; the fact that he might have made an independent investigation; the preparation of the stipulation of the commutation of the award; the fact that Bucher signed the stipulation as the legal representative of the compensation fund; the assent finally given to the deposit of the Resau money in a safe deposit box instead of with a bank; Bucher's actions and demeanor as a witness, to determine his credibility and participation in the scheme of Day.

[3, 4] Appellant cites Ryder v. Bamberger, 172 Cal. 791, 158 P. 753, and other cases to the same effect that it is the duty of the trial court to find in favor of fair dealing if there be two inferences that are equally susceptible of being adopted from all the facts and circumstances. The rule is set forth in Ryder v. Bamberger, supra, as follows (172 Cal. at pages 799, 800, 158 P. at page 756): "For, if there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of court or jury to draw the inference favorable to fair dealing." The rule is applicable when the evidence is equally susceptible of two conflicting inferences. The opinion in the case of Ryder v. Bamberger, supra, 172 Cal. at page 800, 158 P. 753 seems to be that there was no substantial evidence of fraud. In the other cases cited the same principle is involved. In the present case, the testimony of Bucher was considered, but disbelieved. Added to that circumstance is the evident attitude of the trial court showing that he disbelieved any testimony of Day favorable to Bucher. This was the trial court's right. Campbell v. Birch, supra. This court as a matter of law is unable to say that the evidence is insufficient to sustain the findings and judgment.

[5-7] The trial court decided this case on the theory of intentional wrong on the part of Day and Bucher, and a conspiracy between them to defraud the state; and that an agent of the state is jointly responsible with his co-conspirator for damages suffered. Civil Code, sec. 2343, subd. 3; Stirnus v. Adams, 50 Cal.App. 730, 195 P. 955. "In an action for damages resulting from acts of conspirators, the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the de-

gree of his activity. And so, a plaintiff is entitled to a joint recovery of damages against such defendants as he can show have united or cooperated in inflicting a wrong upon him. A person is liable for his participation in a conspiracy, having for its object the commission of a wrongful act, even though he acts only as an agent for another and is unacquainted with the details of the scheme, and although he expected no benefit from the wrongful act and in fact received none." 5 Cal.Jur., p. 530, sec. 30; Mox Incorporated v. Woods, 202 Cal. 675, 262 P. 302; Revert v. Hesse, supra; Mary Pickford Co. v. Bayly Bros., Inc., 12 Cal.2d 501, 86 P.2d 102. Bucher, found to be a conspirator, and found to have been a participant in a wrongful act, is, in the eyes of the law, equally liable with Day for the wrong perpetrated, though he may not have known the details of the scheme from its inception. They were joint tort-feasors and liable equally for the full amount of damages. Day did not appeal from the judgment and it has become final as to him. Respondents have not appealed from the judgment and, therefore, are not in a position to urge the point that as joint tort-feasors Bucher's liability should be the same as Day's. The amount assessed against Bucher, in the absence of an appeal by the respondents, must stand.

The judgment against Bucher represents compensation for a permanent disability of Resau of 100 per cent as found by the Industrial Accident Commission, entitling him to $5,335.20, to be paid at the rate of $22.23 a week for 240 weeks, and thereafter the sum of $13.68 a week for the remainder of his natural life. The prospective term of Resau's natural life was of course uncertain. The chief of the compensation bureau of the commission testified in substance, as related in the narrative statement on appeal, that commutation is based primarily upon the amount of future payments, in turn based upon the normal expectancy of life; that the commission in making the permanent disability rating considered a well recognized mortality table, the history of the case, the condition of the ailment of the applicant, plus the experience of the commission in similiar computations.

The trial court did not fix the amount of damages arbitrarily nor compute the various amounts mentioned during the trial of the case as a basis for damages, but followed the order of the Industrial Accident Commission which had previously fixed the amount, without appeal from that order by any of the parties interested. The order of the commission has long since become final.

[8, 9] Appellant contends (1) that respondents offered no evidence tending to show the amount for which the claim should have been commuted; (2) that, if the claim had not been commuted the Fund would have been obliged to pay the death benefit, from which the accrued compensation should have been deducted. As to the first contention, since the conspiracy prevented a determination of the amount for which the claim should have been commuted, appellant can not be heard to complain. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." Bigelow v. R.K.O. Radio Pictures, Inc., 327 U.S. 274, 66 S.Ct. 574, 580; see, also, Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 172 P.2d 867. On the second point, no citations are given and no argument presented in support of the bare statement. Under such circumstances the matter complained of will be deemed to be without prejudice to appellant's rights. People v. Hermes, 73 Cal.App.2d 947, 168 P.2d 44 and cases cited.

The prayer of the complaint asks for judgment against Day, Bucher and the bonding company in the sum of $8,171.58 "together with interest thereon." The figure $8,171.58 was evidently arrived at by adding to the $6,962.56, the amount of the commuted award, the sum $1,044.81, the previous indemnity payments made to Resau, and $164.21 paid for medical services and expenses. The judgment provides:

"1. That plaintiffs have and recover from defendants C. B. Day, Carroll S. Bucher and Massachusetts Bonding and Insurance Company, a corporation, the total sum of Twelve Thousand Nine Hundred Forty-five and 36/100 Dollars ($12,945.36) being the principal sum of Eight Thousand One Hundred Seventy-one and 58/100 Dollars ($8,171.58) together with interest thereon at the rate of Seven per centum (7%) per annum, compounded annually from February 8, 1937, to and including November 25, 1943, in the sum of Four Thousand Seven Hundred Seventy-three and 78/100 Dollars ($4,773.78), except, however, as to the defendant Carroll S. Bucher only plaintiffs have and recover the sum of Eleven Thousand Thirty-one and 97/100 Dollars ($11,031.97), being the principal sum of Six Thousand Nine Hundred Sixty-two and 56/100 Dollars ($6,962.56) together with interest thereon at the rate of Seven per centum (7%) per annum, compounded annually from February 8, 1937, to and including November 25, 1943.

"2. That plaintiffs have and recover from defendants C. B. Day, Carroll S. Bucher, and Massachusetts Bonding and Insurance Company, a corporation, interest at the rate of seven per centum (7%) per annum compounded annually on the sum of Twelve Thousand Nine Hundred Forty-five and 36/100 Dollars ($12,945.36) from November 25, 1943; except, however, as to defendant Carroll S. Bucher interest as aforesaid shall be computed upon the principal sum of Eleven Thousand Thirty-one and 97/100 Dollars ($11,031.97)."

The judgment is dated April 19, 1944, and recorded April 20, 1944. The record, insofar as this court has been able to discover, does not disclose why November 25, 1943, was selected as a stopping point in the payment of interest, nor why there should be assessed on the first amount compound interest from that date as if it were the date of judgment. It has been suggested that November 25, 1943, is the date of the order for preparation of findings and judgment, and that it automatically terminates the period of payment of interest prior to judgment. United Taxpayers Co. v. City & County of San Francisco, 55 Cal.App. 239, 203 P. 120, does not sustain such suggestion. At page 243 of 55 Cal.App., at page 121 of 203 P., the court said: "An order for judgment is not a judgment. Delger v. Jacobs, 19 Cal.App. 197, 125 P. 258; Canadian, etc., Co. v. Clarita, etc., Co., 140 Cal. 672, 74 P. 301. Interest, by the express language of section 1920 of the Civil Code, is allowable upon judgments from the date of their entry only." In Walters v. Bank of America etc., Ass'n, 9 Cal.2d 46, 58, 69 P.2d 839, 844, 110 A.L.R. 1259, the court stated: "The trial court allowed interest from May 10, 1930, the date of the attachment. The respondent's right to interest did not accrue until July 14, 1930, the date of the judgment. The judgment should be modified to correct that error." See, also, Bibend v. Liverpool & L. Fire & Life Ins. Co., 30 Cal. 78; Clark v. De Saisset, 5 Cal.App.2d 23, 41 P.2d 945; Wells Fargo & Co. v. City, etc., of San Francisco, 25 Cal.2d 37, 152 P.2d 625. In Gillanders v. Da Silva, 212 Cal. 626, 299 P. 722, an action to reform a liability indemnity insurance policy, the form of the judgment resulted in a compounding of interest on the original judgment. The court said (212 Cal. at page 632, 299 P. at page 724): "Obviously this was an allowance of interest on interest for which there appears to be no authority in law in such a case." The order of the trial court was affirmed after modification of the amount. Whatever interest may be due in this case it will be necessary to order a modification, though the date November 25, 1943, assumed to be the date of the order for judgment, is not of great importance as the interest rule applies in this case.

The first matter to be considered on the subject of damages is whether the compound interest was proper in this case. The compounding of interest has not been approved, legislatively or judicially, in this state in a case like the present. Doe v. Vallejo, 29 Cal. 385; Yndard v. Den, 116 Cal. 533, 48 P. 618, 58 Am.St.Rep. 200; Schneider v. Turner, 10 Cal.2d 771, 76 P.2d 668.

"It should also be noted that the Legislature has expressly provided that 'in the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded, nor shall the interest thereon be construed to bear interest *unless an agreement to that effect is clearly expressed in writing* and signed by the party to be charged therewith.' (Emphasis ours.) Deering's Gen.Laws(1937), Act 3757, § 2. [Stats.1919, p. lxxxiii.]

"How the defendant expects the court to imply an agreement to pay compound interest in view of this statute, he does not explain." Robertson v. Dodson, 54 Cal. App.2d 661, 665, 129 P.2d 726, 728.

[10] The legal rate of interest in this state is seven per centum. Const. of California, Art. XX, sec. 22. The general rule is that interest may not be computed on accrued interest unless by special statutory provision, or by stipulation of the parties, and in the latter event the amount may not be fixed in conflict with statutory provisions. Yndard v. Den, supra; Usury Law, Stats.1919, p. lxxxiii and Deering's California General Laws, Act 3757; Schneider v. Turner, supra.

In City of Los Angeles v. Aitken, 32 Cal. App.2d 524, 531, 532, 90 P.2d 377, 381, 94 P.2d 1045, a condemnation proceeding, it was held that the interlocutory decree "becomes a 'judgment' within the meaning of section 22, article XX, of the Constitution, and that pending an appeal by the condemnor, such judgment bears interest at the legal rate from the expiration of thirty days after its entry until paid. As we have stated, this is the precise situation which is found in any ordinary action for the recovery of a money judgment, and we see no valid reason why interest upon the judgment here should not be recovered as it is recovered in other cases."

"One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." Civil Code, sec. 1709. "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt." Civil Code, sec. 3287. "The damages prescribed by this chapter are exclusive of exemplary damages and interest, except where those are expressly mentioned." Civil Code, sec. 3357. Civil Code section 3288 provides: "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury." The discretion of the court does not include the right to make an order for interest upon interest because that would constitute a penalty over and above that expressly allowed in cases of oppression, fraud or malice. Civil Code, sec. 3294. The claim here involved was originally determined by the Industrial Accident Commission and subsequently declared by such commission to be based upon a permanent disability wherein interest was fixed by statute "at the rate of six per cent per annum." Labor Code, sec. 5101(b). The amount of the principal in this case was capable of being made certain (Civil Code, sec. 3287), and in fact was made certain by the action of the Industrial Accident Commission in the sum of $6962.56, the commutation award.

The court explicitly found Bucher joined and entered into said conspiracy shortly after the time he became counsel of State Compensation Insurance Fund on or about January 27, 1937, and decreed that while the judgment against Day should be in the sum of $8,171.58, Bucher should be held liable for a lesser amount—$6,962.56.

[11] Respondents at the time of oral argument admitted that appellant "might be" right on the question of compound interest. Under the cited cases and code sections it appears that simple interest at the legal rate may be charged against Bucher, but not compound interest.

[12, 13] The trial court evidently adopted the view that the Fund was deprived of the use of $6,962.56—the amount of the commutation wherein Bucher played a part—on February 8, 1937. The respondents did not appeal from the amount of the judgment against Bucher, and hence may not object to it in that respect. The court fixed the date for the commencement of interest on the $6,962.56 as February 8, 1937.

The record does not disclose that plaintiffs requested interest from about February 6, 1936, the inception of the conspiracy. The allowance of interest in a fraud case prior to judgment is in the discretion of the trial court. Though Day and Bucher were equally culpable from the inception of the conspiracy, the particular sum of $6,962.56 was not paid out until February 8, 1937. The Fund may have been deprived of other money prior to that date, for which Day may have been responsible as a conspirator, and Bucher as a subsequent aider and abettor. But, right or wrong, the trial court has seen fit to hold Bucher only for the $6,962.56, the amount of the commuted award. Since the state was deprived of that sum on February 8, 1937, it is quite clear that interest, which the court in its discretion has determined should be paid, should start on that date. Since the trial court has seen fit, right or wrong, to exonerate Bucher for liability for the other principal sum involved, and the respondents have not appealed, it would appear that Bucher could not be made to pay interest on that principal sum for which he was held not liable.

[14] The trial court is directed to modify the findings and the judgment against Bucher by striking out all amounts representing compound interest and inserting in lieu thereof simple interest at the legal rate from February 8, 1937, continuing until the judgment is paid. When so modified under the direction of the trial court, the judgment will stand affirmed; each side to pay its own costs.

PETERS, P. J., and SCHOTTKY, Justice pro tem., concur.

29 Cal.2d 125

COVERT v. STATE BOARD OF EQUALIZATION et al.

Sac. 5766.

Supreme Court of California, in Bank.
Oct. 17, 1946.

As Modified Nov. 14, 1946.

1. Mandamus ⇨23(2)

Under statute providing that "any person" may file complaint with State Board of Equalization against liquor licensee, a citizen was entitled to seek mandamus to compel the board to revoke on-sale liquor license. Code Civ.Proc. § 1086; Gen.Laws Act 3796, § 40.

See Words and Phrases, Permanent Edition, for all other definitions of "Any Person".

2. Mandamus ⇨3(8)

A citizen was not precluded from seeking mandamus to compel State Board of Equalization to revoke on-sale liquor license on ground that citizen had adequate remedy at law under Unlawful Liquor Sales Abatement Act, since the act does not permit any attack on license, and proceeding thereunder could not serve to accomplish purpose sought of revocation or suspension of liquor license. Gen.Laws Act 3778; Stats.1933, p. 1697; Const. art. 20, § 22.

3. Mandamus ⇨151(1), 187(3)

In mandamus proceeding by citizen to compel State Board of Equalization to revoke on-sale liquor license, licensee had right to appear as party or appellant where licensee was named a party by the citizen and licensee had direct interest in any proceeding to revoke his license.

4. Intoxicating liquors ⇨108(9, 10)

The State Board of Equalization has quasi judicial or adjudicating power to make determinations of fact which are not reviewable in trial de novo in superior court, and in order to revoke liquor license board must examine the facts, resolve any conflicts in evidence, and exercise its judgment with respect thereto, and revocation may be only "for good cause" so that board must afford opportunity for full hearing. Const. art. 20, § 22.

5. Intoxicating liquors ⇨108(10)

The decision of State Board of Equalization in revoking or refusing to revoke liquor license will be sustained if board has committed no error of law and if the evidence, although conflicting, is sufficient to support board's findings of fact. Const. art. 20, § 22.

6. Intoxicating liquors ⇨108(10)

Even if State Board of Equalization has erred in refusing to revoke liquor license, evidence will not be weighed by court but matter will be remanded to the board for further consideration. Const. art. 20, § 22.

7. Intoxicating liquors ⇨129

Under Constitution giving State Board of Equalization liquor control powers, the board's decisions are final, reviewable for excess of jurisdiction, errors of law, abuse of discretion, and insufficiency of evidence, and where there is error the matter ordinarily should be remanded to the board for further proceedings. Const. art. 20, § 22.

8. Constitutional law ⇨74
Intoxicating liquors ⇨15

The provision of Alcoholic Beverage Control Act prior to its amendment in 1945 is unconstitutional insofar as it purported to authorize superior court to reweigh the evidence heard by State Board of Equalization. Gen.Laws Act 3796, § 46; Const. art. 20 § 22.

9. Intoxicating liquors ⇨108(10)

Even if facts found by State Board of Equalization which refused to revoke on-sale liquor license disclosed violation of the Constitution, trial court could not order revocation of license, since it was for board to determine at least in first instance whether penalty should be revocation or suspension. Const. art. 20, § 22.

10. Intoxicating liquors ⇨70, 72

In determining whether particular establishment qualifies under Constitution permitting only a bona fide public eating place to be licensed to sell intoxicating liquor, it is province of State Board of Equalization to ascertain the facts, and after probative facts have been settled problem becomes one of construction and application of the Constitution and pertinent statutes, which is a question of law for courts. Const. art. 20, § 22.

11. Intoxicating liquors 🔑70

Under Constitution permitting only a bona fide public eating place to be licensed to sell liquor, existence of bona fides is not to be determined merely from expressed intention of licensee, but must be ascertained objectively on basis of all physical characteristics and actual mode of operation of the business, which circumstances present questions of fact, but the conclusion to be drawn therefrom is a question of law. Const. art. 20, § 22.

12. Intoxicating liquors 🔑58

Under Constitution permitting only a bona fide public eating place to be licensed to sell liquor, that business of selling food does not produce as much income as business of selling liquor does not destroy the bona fide character of a restaurant; "bona fide" meaning "in or with good faith; without fraud or deceit; genuine". Const. art. 20, § 22.

See Words and Phrases, Permanent Edition, for all other definitions of "Bona Fide".

13. Intoxicating liquors 🔑58

The gross food sales of a restaurant or cafe need not constitute its principal business in order to qualify it as a "bona fide public eating place" within Constitution permitting only a bona fide public eating place to be licensed to sell liquor. Const. art. 20, § 22.

See Words and Phrases, Permanent Edition, for all other definitions of "Bona Fide Public Eating Place".

14. Intoxicating liquors 🔑58

A restaurant would not be "bona fide" within Constitution permitting only a bona fide public eating place to be licensed to sell liquor if the restaurant were operated as subterfuge to obtain right to sell liquor, but there must be equipment, supplies, and personnel appropriate to restaurant, real holding out to sell food, and substantial sales of food. Const. art. 20, § 22.

15. Intoxicating liquors 🔑108(5)

Evidence that establishment was equipped and staffed to serve food, that it was held out to public as a place where meals could be obtained, and that no food was ever refused when requested, supported conclusion of State Board of Equalization that establishment was a bona fide restaurant justifying refusal to revoke on-sale liquor license notwithstanding approximately 80 per cent. of gross income was derived from sale of liquor. Const. art. 20, § 22.

16. Intoxicating liquors 🔑60

Under Constitution permitting only a bona fide public eating place to be licensed to sell liquor, not even a bona fide restaurant or hotel may obtain a public saloon, public bar, or public barroom which are prohibited even if located on premises which are otherwise qualified to serve liquors. Const. art. 20, § 22.

17. Intoxicating liquors 🔑60

Under Constitution permitting only a bona fide public eating place to be licensed to sell liquor, the statutory definition of "public bar", "public saloon", or "public barroom" is persuasive but not controlling. Gen.Laws Act 3796, § 2(m); Const. art. 20, § 22.

See Words and Phrases, Permanent Edition, for all other definitions of "Saloon".

18. Intoxicating liquors 🔑110

The use of a bar or counter in restaurant for service of liquor does not necessarily constitute the premises a "public saloon, public bar or public barroom", within Constitution prohibiting consumption of liquor in such places. Const. art. 20, § 22.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Bar", "Public Barroom", and "Public Saloon".

19. Intoxicating liquors 🔑108(5)

Evidence including showing that meals were served when requested, that cafe was divided into two parts in one of which was a bar used for service of liquor, where food could be obtained, and that entertainment could be observed and heard in both portions of the room, failed to show that licensee operated a saloon or barroom within Constitution prohibiting consumption of liquor in such places. Const. art. 20, § 22.

Appeal from Superior Court, of Sacramento County; Malcolm C. Glenn, Judge.

Proceeding in mandamus by E. E. Covert against the State Board of Equalization and others to compel the board to revoke an on-sale liquor license. From a judgment granting the writ, defendants appeal.

Reversed.

Prior opinion 162 P.2d 717.

Robert W. Kenny, Atty. Gen., J. Albert Hutchinson and Carl W. Wynkoop, Deputy Attys. Gen., Carl B. Sturzenacker, of Hollywood, and Allen L. Martin, of Fresno, for appellants.

Ralph E. Swing, of San Bernardino, amicus curiae on behalf of appellants.

Donald Paul Covert and A. W. Lane, both of Glendale, for respondent.

Bernard C. Brennan and John W. Loucks, both of Los Angeles, amici curiae on behalf of respondent.

GIBSON, Chief Justice.

The Superior Court of Sacramento County issued a writ of mandate directing the State Board of Equalization to revoke the on-sale liquor license* of Thomas C. McMillan, operator of a cafe, on the ground that the premises constituted a public saloon, and not a bona fide restaurant, contrary to section 22 of article XX of the California Constitution. The board and the licensee have appealed from this judgment.

Petitioner Covert, a citizen of Glendale, filed a complaint with the board asking that it revoke the license, and hearings were held before a representative of the board at which testimony was taken with respect to the character of the establishment and the manner in which the business was operated. It was shown that the premises consisted of a large cafe containing a bar, and that although the food equipment was of greater value than the bar equipment, approximately 80 per cent of the gross income was derived from the sale of liquor. The board concluded that the evidence did not establish a violation and ordered the complaint dismissed.

This proceeding was then instituted to compel the board to revoke the license. The entire transcript of proceedings before the board was admitted upon the trial and no other testimony was offered. The court found that the principal business of the cafe was the sale of intoxicating liquors and that the serving of food was a pretense and a sham in order to give the business the appearance of a restaurant, and concluded that the place was a public saloon and not a bona fide restaurant. A peremptory writ of mandate was issued directing revocation of the license.

I. Proper Parties to This Proceeding.

[1] The board contends that Covert, appearing merely as a citizen, has shown no special interest and, therefore, is not entitled to seek a writ under section 1086 of the Code of Civil Procedure which provides that a writ of mandate may be issued on petition "of the party beneficially interested." Section 40 of the Alcoholic Beverage Control Act, Stats.1935, pp. 1123, 1143, 2 Deering's Gen. Laws, Act 3796, § 40, provides that "any person" may file a complaint with the board against a licensee, and this right would be of little value if the complainant could not compel the board to perform its duties. A person whose complaint has been rejected by the board has a sufficient interest to institute proceedings for a writ of mandate. See Bodinson Mfg. Co. v. California E. Comm., 17 Cal.2d 321, 330, 109 P.2d 935.

[2] Further, with respect to petitioner's right to maintain this proceeding, it is asserted that he has an adequate remedy in the ordinary course of the law under the Unlawful Liquor Sales Abatement Act of

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* At the time of the hearing before the board the licensee held two separate on-sale licenses, one for distilled spirits and one for beer and wine. Under the 1945 amendment to section 6 of Alcoholic Beverage Control Act, Stats.1945, pp. 2615, 2621, 2 Deering's Gen.Laws, Act 3796, § 6, provision was made for a single "on-sale general license" covering both types of sales, and since it may be assumed that the cafe is now operated under such a license, we have here used the term in the singular.

1915, Stats.1915, p. 236, 2 Deering's Gen. Laws, Act 3778. Assuming that the act has not been repealed by implication because of the adoption of section 22 of article XX of the Constitution and the State Liquor Control Act of 1933, Stats.1933, ch. 658, p. 1697 (see Hammond v. McDonald, 32 Cal.App.2d 187, 89 P.2d 407), it nevertheless would not afford an adequate remedy. Although the act of 1915 in effect authorizes an abatement proceeding against the building or place used, it does not permit any attack on the license, and a proceeding thereunder could not serve to accomplish the full purpose sought by petitioner, namely, revocation or suspension of McMillan's liquor license.

[3] There is no merit in petitioner's contention that the *licensee* has no right to appear as a party or appellant in this mandate proceeding. The licensee was named as a party by petitioner, and it is obvious that he has a direct interest in any proceeding to revoke his license.

II. Powers and Duties of the Board.

[4] The court reweighed the evidence before the board, made new findings, and ordered revocation of the license without remanding the case to the board. An examination of the Constitution of California shows that the State Board of Equalization, unlike most other agencies of statewide authority (see Laisne v. California State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457), has specifically been given quasi judicial, or adjudicating power, that is, the right to make determinations of fact which are not subject to reexamination in a trial de novo in the superior court. Section 22 of article XX provides, in part: "The State Board of Equalization shall have the exclusive power to license the manufacture, importation and sale of intoxicating liquors in this State, * * * and shall have the power, *in its discretion, to deny or revoke* any specific liquor license *if it shall determine for good cause* that the granting or continuance of such license would be contrary to public welfare or morals." (Italics added.) In order to revoke a license the board obviously must examine the facts, resolve any conflicts in the evidence, and exercise its judgment with respect thereto. A revocation may be only "for good cause," and, accordingly, the board must afford an opportunity for a full hearing, an essential element of a quasi judicial proceeding. La Prade v. Department of Water & Power, 27 Cal.2d 47, 162 P.2d 13; Steen v. Board of Civil Service Comm'rs, 26 Cal.2d 716, 160 P.2d 816; cf. Carroll v. California Horse Racing Bd., 16 Cal.2d 164, 105 P.2d 110. This does not mean, of course, that the "discretion" given to the board is absolute, since it must be exercised in accordance with the law.

[5, 6] The functions of the board are thus similar in some respects to those of a local administrative tribunal, a decision of which will be sustained if it has committed no error of law and if the evidence, although conflicting, is sufficient to support its findings of fact. La Prade v. Department of Water & Power, supra, 27 Cal.2d 47, 53, 162 P.2d 13; Lindell Co. v. Board of Permit Appeals, 23 Cal.2d 303, 144 P.2d 4; Walker v. City of San Gabriel, 20 Cal.2d 879, 129 P.2d 349, 142 A.L.R. 1383; See Tenth Biennial Report of the Judicial Council of California (1944), p. 141. Further, even if there has been error, the evidence will not be weighed by the court but the matter will be remanded to the board for further consideration. La Prade v. Department of Water & Power supra. Cases such as Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304, and Laisne v. California State Board of Optometry, supra, 19 Cal.2d 831, 123 P.2d 457, permitting limited or qualified trials de novo after rulings of certain statewide administrative bodies, are based on the theory that the Legislature cannot, under our Constitution, give these agencies powers of a judicial nature. The basic premise of those cases is absent here, however, because the State Board of Equalization is given its liquor control authority directly by the Constitution.

Board of Trustees v. State Board of Equalization, 1 Cal.2d 784, 37 P.2d 84, 96 A.L.R. 775, and Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119, are not in point as they do not involve the liquor control powers given to the board by section 22 of article XX of the Constitution as amended in 1934.

[7] It would appear, therefore, from the foregoing authorities, that the decisions of the board are final, subject to review for excess of jurisdiction, errors of law, abuse of discretion and insufficiency of the evidence, and that where there is error the matter ordinarily should be remanded to the board for further proceedings.

[8] It follows from the foregoing that section 46 of the Alcoholic Beverage Control Act, as it read prior to its amendment in 1945, Stats.1945, pp. 2615, 2644, 2 Deering's Gen. Laws, Act 3796, § 46, was unconstitutional insofar as it purported to authorize the superior court to reweigh the evidence. It may be noted that section 46, as amended in 1945, specifically provides that court review of decisions of the board shall be "Subject to the provisions of Section 22, Article XX, of the Constitution * * *."

[9] In the present case, even assuming that the facts found by the board disclosed a violation of the Constitution, it was not proper for the trial court to order revocation of the license. This is not a case where the violation, if any, would leave the board with no alternative but revocation, since it is for the board to determine, at least in the first instance, whether the penalty should be revocation or merely suspension. Reynolds v. State Board of Equalization, Cal.Sup., 173 P.2d 551.

III. Qualification of the Premises as a Proper Place for Sale of Intoxicating Liquors.

It is contended in this proceeding that the licensee was engaged in selling intoxicating liquors in a public saloon, public bar or public barroom and not in a bona fide restaurant. The basic requirements or qualifications for the sale of intoxicating liquors for consumption on the premises are prescribed by section 22 of article XX of the Constitution as amended in 1934, which provides, in part "Intoxicating liquors, other than beers, shall not be consumed, bought, sold, or otherwise disposed of for consumption on the premises, in any public saloon, public bar or public barroom within the State; provided, however, that subject to the aforesaid restriction, all intoxicating liquors may be kept and may be bought, sold, served, consumed, and otherwise disposed of in any bona fide hotel, restaurant, cafe, cafeteria, railroad dining or club car, passenger ship, or other public eating place, or in any bona fide club after such club has been lawfully operated for not less than one year."

[10, 11] In determining whether or not a particular establishment qualifies under the Constitution it is the province of the board to ascertain the facts, for example, the physical aspects, equipment and supplies, the amount of food and liquor sold, and the manner in which the business is conducted. After the probative facts have been settled the problem becomes one of construction and application of the Constitution and pertinent statutes. This, of course, is a question of law for the courts to decide. See Bila v. Young, 20 Cal.2d 865, 867, 129 P.2d 364. The existence of bona fides is not to be determined merely from the expressed intention of the licensee, but, like the determination of whether a place is a "saloon" or a "restaurant," it must be ascertained objectively on the basis of all the physical characteristics and the actual mode of operation of the business. These circumstances present questions of fact (Hammond v. McDonald, 49 Cal.App.2d 671, 686, 122 P.2d 332; cf. Sandelin v. Collins, 1 Cal.2d 147, 33 P.2d 1009, 93 A.L.R. 956), but the conclusion to be drawn therefrom is a question of law.

The evidence in this case shows that the room in which patrons were served was divided into two portions by a line of booths about five feet high. In one side of the room was a bar or counter and in the other were tables. The space around the bar occupied 480 square feet, whereas the dining room proper occupied 1120 square feet. The kitchen was in a separate room. There were two signs outside the building, one reading "Tom Tom Cafe" and one much smaller reading "Cocktails." Entertainment was furnished to patrons. The equipment for serving food, including two stoves, cost about $3,000, while that used for serving drinks cost about $1,000. Both liquor and food were sold at the bar as well as at the tables, although patrons eating customarily used the tables. Two cooks were employed, "one cook all the time and two cooks Friday, Saturday and Sunday evening." Radio advertisements were devoted largely to the sale of food, including steak and chicken dinners. Neither petitioner nor any of his witnesses claimed that meals were ever refused when requested. As stated above, the gross sales of food amounted to about 20 per cent of the total income.

[12] Petitioner's main contention is that the place could not be deemed a bona fide restaurant because the income from the sale of liquor exceeded that from the sale of food. The Constitution does not provide any such quantitative test, however, but rather it simply requires that there be a bona fide public eating place. "Bona fide" is defined as "in or with good faith; without fraud or deceit; genuine." See Webster's New International Dictionary (1942). The sale of liquor is permitted in a bona fide restaurant, and the mere fact that the business of selling food does not produce as much income as the business of selling liquor does not destroy the bona fide character of a restaurant. As a general proposition it is clear that one of several businesses conducted on the same premises may be "genuine" although it may be smaller than the others. There is nothing to indicate that anything different was intended here where the Constitution plainly contemplated the coexistence of two businesses—sale of food and sale of liquors. The fact that the existence of one business was made a prerequisite to the operation of the other does not mean that the former had to be maintained as the larger of the two.

[13] Accordingly, we must reject the contention that the gross food sales of a restaurant or cafe must constitute its principal business in order to qualify it as a bona fide public eating place. The language in Hammond v. McDonald, supra, 49 Cal. App.2d 671, 685, 122 P.2d 332, to the effect that where the sale and service of intoxicating liquor becomes the principal business, the place is no longer a bona fide restaurant, is disapproved.

[14] It is true, of course, that a restaurant would not be bona fide if it were created or operated as a mere subterfuge in order to obtain the right to sell liquor. There must not only be equipment, supplies, and personnel appropriate to a restaurant, together with a real offer or holding out to sell food whenever the premises are open for business, but there must also be actual and substantial sales of food. A close analogy in this respect is afforded by United States v. Carolina Freight Carriers Corporation, 315 U.S. 475, 480, 481, 62 S.Ct. 722, 726, 86 L.Ed. 971, where the court, interpreting a statute requiring "bona fide operation" of a motor carrier, stated "That standard carries the connotation of substantiality. It also makes clear that a holding out to serve * * * is not alone sufficient. It is 'actual rather than potential or simulated service' which is required. * * * Substantial, as distinguished from incidental, sporadic, or infrequent, service is required."

[15] The record shows that McMillan's establishment was equipped and staffed to serve food; that the cafe was held out to the public as a place where meals could be obtained; and that chicken sandwiches, steak sandwiches, and chicken dinners were commonly served on the premises. There is no evidence that food was ever refused when requested. While gross income from food was less than that from liquor, it does not appear that the respective amounts were so disproportionate as to show that the sales of food constituted a mere subterfuge. Under all the circumstances, therefore, it is our opinion that the evidence supports the conclusion of the board that the licensee operated a bona fide restaurant.

[16] It must next be determined whether the licensee operated a "public saloon, public bar or public barroom," since it appears from section 22 of article XX that not even a bona fide restaurant or hotel may maintain such a room. No other interpretation will give full effect to the section which, after first banning saloons, and barrooms, states that *"subject to the aforesaid restriction"* liquors may be served in certain enumerated places. It follows, therefore, that all saloons and barrooms are prohibited whether or not they are located on premises which are otherwise qualified to serve intoxicating liquors.

[17] A "saloon" has been defined generally as "a shop where intoxicating liquors are sold and drunk, commonly without meals." See Webster's New International Dictionary (1942). Section 2(m) of the Alcoholic Beverage Control Act, as amended in 1945, Stats.1945, pp. 2615, 2618, 2 Deering's Gen.Laws, Act 3796, § 2(m) gives a more specific definition, as follows: "'Public bar,' or 'public saloon' or 'public barroom' means and shall be deemed to be premises maintained and operated for the selling or serving of alcoholic beverages, other than beer, to the public for consumption on the premises, and which are not equipped and maintained for the sale and service of meals to the public, and in which meals are not actually sold and served to the public." (Italics added.) The statutory definition, which is of persuasive although not controlling authority (see Delaney v. Lowery, 25 Cal.2d 561, 569, 154 P.2d 674), is consistent with section 22 of article XX.

[18] The use of a bar or counter in a restaurant for service of liquor does not necessarily constitute the premises a "public saloon, public bar or public barroom," since restaurants and cafes which do not sell liquor frequently have counters. If, however, a bar is employed for the serving of intoxicating beverages, it must be located in the restaurant, and meals must be served at the bar whenever requested.

[19] The evidence in the present case does not show that the licensee operated a saloon or barroom within the meaning of the Constitution. As stated above, meals were served when requested and the amount of actual sales of food was sufficient for a bona fide restaurant business. Although the cafe was divided into two parts, in one of which was a bar used for service of liquor, the partition consisted only of a line of booths about five feet high; a person could see over the partition; and the entertainment which was provided could be observed and heard in both portions of the room. Also, food could be obtained at the bar, and there is nothing in the record to indicate that the bar was ever kept open for business at a time when meals were not available. The evidence supports the decision of the board, and, accordingly, the judgment must be reversed.

CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

29 Cal.2d 137

REYNOLDS v. STATE BOARD OF EQUALIZATION.

Sac. 5765.

Supreme Court of California, in Bank.
Oct. 17, 1946.

1. Intoxicating liquors 🔑108(9)

Under Constitution prohibiting consumption of liquor in any public saloon or public barroom, but providing that sales for consumption on premises may be made in any bona fide hotel, restaurant, or other public eating place, State Board of Equalization need not as matter of law revoke rather than suspend a license. Const. art. 20, § 22; Civ.Code, § 3536; Stats.1933, pp. 1703, 1704, 1705, §§ 19, 20, 22, 23, 25; Gen.Laws Act 3796, §§ 38e, 40–43, 46, 48.6.

2. Constitutional law 🔑20

When the Constitution has a doubtful or obscure meaning or is capable of various interpretations, construction placed thereon by Legislature is very persuasive.

3. Intoxicating liquors 🔑106(1)

A liquor license does not automatically become void whenever licensee fails to sell food on the premises. Const. art. 20, § 22.

4. Intoxicating liquors 🔑108(9)

The State Board of Equalization has duty to enforce the prohibition against sales of liquor in public saloons, but the Constitution does not require that such restriction be carried out by revocation rather than by suspension, since a suspension until such time as qualifications are met will completely ban all sales in violation of law. Const. art. 20, § 22.

5. Intoxicating liquors ⚷108(9)

Where a cafe ceased to qualify as a proper place for sale of alcoholic beverages, State Board of Equalization did not abuse its discretion in suspending rather than revoking the license. Const. art. 20, § 22.

6. Intoxicating liquors ⚷108(10)

The State Board of Equalization was not precluded from reinstating suspended liquor license on theory that license was void and had to be revoked and an application for new license was necessary. Const. art. 20, § 22.

7. Mandamus ⚷164(4)

The State Board of Equalization would not be compelled by mandamus to revoke liquor license on ground that board had reinstated suspended license without evidence and findings of change in mode of business conducted, where board's answer stated that board's representatives had made a complete investigation discovering that changed conditions had taken place since suspension. Code Civ.Proc. § 1963, subd. 15; Const. art. 20, § 22.

8. Evidence ⚷83(1)

In absence of evidence to the contrary, it must be presumed that State Board of Equalization acted properly in performance of its official duties. Code Civ.Proc. § 1963, subd. 15.

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Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceeding in mandamus by Clifton G. Reynolds against the State Board of Equalization to compel the board to revoke a liquor license of a cafe. From a judgment granting the writ, defendant appeals.

Reversed.

Prior opinion 162 P.2d 735.

Robert W. Kenny, Atty. Gen., and Allen L. Martin and J. Albert Hutchinson, Deputy Attys. Gen., for appellant.

B. Grant Taylor, of Redwood City, Edwin E. Grant, of San Francisco, and Jesse W. Curtis, of San Bernardino, for respondent.

Bernard C. Brennan and John W. Loucks, both of Los Angeles, amici curiae on behalf of respondent.

GIBSON, Chief Justice.

This is a companion case to Covert v. State Board of Equalization, Cal.Sup., 173 P.2d 545. As in the Covert case, the matter came to this court by appeal from a judgment of the superior court issuing a peremptory writ of mandate directing the State Board of Equalization to revoke the liquor license * of a cafe. The principal question involved is whether the board has the power to suspend as well as revoke a license. With respect to this issue, none of the material allegations in the petition for the writ were denied by the answer, and the case was submitted to the trial court on the pleadings.

It appears that prior to August, 1943, the licensees, Joe Enos and Enrico Olcese, operated a cafe in Santa Clara County and held a license issued by respondent board for selling intoxicating beverages, apparently for consumption on the premises. The petitioner filed a complaint with the board alleging, among other things, that the licensees maintained a public saloon, selling intoxicating liquors, although the premises and business did not constitute a bona fide hotel, restaurant or other public eating place, in violation of section 22 of article XX of the California Constitution. In December, 1943, a hearing was held before a representative of the board. The representative made findings to the effect that the licensees did not maintain a bona fide public eating place; that no food was customarily served excepting sandwiches sold at cost; and that practically the entire business consisted of the sale of alcoholic beverages. In accordance with the recommendation of its representative, the board, in February, 1944, notified the licensees that their license was indefinitely suspended. Petitioner, asserting that the order of suspension was inadequate, asked for a reconsideration and that the license be revoked. In March, 1944, the board denied the request for reconsideration and at the same time reinstated the license.

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* At the time of the hearing before the board the licensees held two on-sale licenses, one relating to distilled spirits and one to beer and wine, and a third license permitting bottling of wine. Under the 1945 amendment to section 6 of the Alcoholic Beverage Control Act, Stats.1945, pp. 2615, 2621, 2 Deering's Gen.Laws, Act 3796, § 6, a provision was made for a single "on-sale general license" covering all acts permitted by these licenses, and since it may be assumed that the cafe is now operated under such a license, we have here used the term in the singular.

The petition for mandate, filed shortly thereafter, alleged that on the facts found by the representative there was a clear duty to revoke the license and that the board was without power to reinstate it.

The trial court concluded that the indefinite suspension was insufficient; that it was the duty of the board to revoke the license; and that the board had no right to restore the license except upon a new application. The judgment provided that a writ issue directing the board to revoke the license forthwith.

Petitioner contends, in support of the judgment, that when the premises ceased to be a bona fide restaurant or other public eating place they ceased to qualify under the Constitution as a proper place for the sale of intoxicating liquor for consumption on the premises and that the license thereupon became invalid and void and was not susceptible of suspension.

Section 22 of article XX of the California Constitution prohibits consumption of intoxicating liquor in any public saloon or public barroom, but provides that sales for consumption on the premises may be made in any bona fide hotel, restaurant or other public eating place. Under the facts found by the board and admitted in the pleadings, it is clear that at the time of the suspension the cafe had ceased to qualify as a proper place for the sale of alcoholic beverages. See Covert v. State Board of Equalization, Cal.Sup., 173 P.2d 545, for a discussion of what constitutes a bona fide restaurant.

[1] Section 22 further provides that the State Board of Equalization "shall have the exclusive power to license the * * * sale of intoxicating liquors * * * and shall have the power, in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals." Although it may be conceded that under this section there would be an abuse of discretion if the board purported to authorize the sale of liquor for consumption on the premises when the business there conducted failed to meet the prescribed qualifications, it does not necessarily follow that the board is required, as a matter of law, to revoke, rather than suspend, the license. Neither the language nor purpose of the section compels such a conclusion.

Under the general principle that the greater contains the less (adopted as a maxim by Civ.Code, § 3536), it has frequently been held that statutes authorizing a board or commission to revoke, terminate, or dismiss include the lesser penalty of suspension or limitation. See, for example, Schnitzler, v. Yellowley, D.C., 290 F. 849, 852, 853; Klatt v. Guaranteed Bond Co., 213 Wis. 12, 250 N.W. 825, 830; Goldsmith v. Board of Education, 66 Cal. App. 157, 163, 164, 225 P. 783.

[2] The Legislature has interpreted section 22 of article XX of the Constitution as conferring a power to suspend. Both the Liquor Control Act of 1933, Stats. 1933, ch. 658, pp. 1703, 1704, 1705, §§ 19, 20, 22, 23 and 25 and the superseding Alcoholic Beverage Control Act of 1935, Stats.1935, p. 1123, 2 Deering's Gen. Laws, Act 3796, §§ 38e, 40-43, 46, 48.6, authorized suspension as well as revocation. It is well settled that "When the Constitution has a doubtful or obscure meaning or is capable of various interpretations, the construction placed thereon by the Legislature is of very persuasive significance." Delaney v. Lowery, 25 Cal.2d 561, 569, 154 P.2d 674, 678.

[3] There is nothing in the Constitution which supports petitioner's contention that a liquor license automatically becomes void, beyond any possibility of revival, whenever the licensee fails to sell food on the premises. The language of section 22 indicates that some action by the board is necessary before a license is terminated. The rule suggested by peti-

tioner, moreover, is impracticable and would lead to much uncertainty and confusion, since persons apparently holding valid licenses would nevertheless be subject to charges that because they may have, at some time in the past, made insufficient sales of food, all subsequent sales of liquor were illegal.

[4] The board, of course, has a duty to enforce the prohibition against sales of liquor in public saloons, but the Constitution does not require that this restriction be carried out by revocation rather than by suspension. It is obvious that a suspention until such time as the qualifications are met will completely ban all sales in violation of the law.

The case of Board of Trustees of Stanford University v. State Board of Equalization, 1 Cal.2d 784, 37 P.2d 84, 96 A.L.R. 775, relied on by petitioner, does not hold that the board is compelled to revoke a license for every violation of the Constitution, however small. The court there directed the board to cancel a license for a violation of a statute, but apparently no question was raised as to the possibility of merely suspending the license.

[5] We conclude, therefore, that the board did not abuse its discretion in suspending, rather than revoking, the license.

[6] Petitioner contends that the board should not have reinstated the license, arguing that, since the license was void and had to be revoked, there was nothing to suspend and an application for a new license was necessary. This argument must fail, however, because, as petitioner concedes, it depends upon the assumption that the license was void and was required to be revoked.

[7, 8] Finally, it was alleged in the petition for mandate that the board reinstated the license "without evidence and findings of a change in the mode and character of business conducted." The answer of the board, however, denied this allegation and stated that its representatives had made a complete investigation, discovering that a change in conditions had taken place since the suspension so as to warrant reinstatement. Petitioner presented no evidence in support of his allegation, and the record does not contain sufficient facts either to show what occurred at the time of the reinstatement or to permit a court to review the procedure followed by the board. Moreover, in the absence of evidence to the contrary, it must be presumed that the board acted properly in the performance of its official duties. Code Civ.Proc. § 1963, subd. 15. Accordingly, we hold that petitioner has not sustained the burden of proving the allegations of the petition with respect to the reinstatement of the license.

The judgment is reversed.

CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

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76 Cal.App.2d 525

ROADSIDE REST, Inc., v. LANKERSHIM ESTATE et al.

Civ. 15290.

District Court of Appeal, Second District, Division 1, California.

Oct. 17, 1946.

Rehearing Denied Nov. 4, 1946.

Hearing Denied Dec. 12, 1946.

1. Action 🔑6

In action for declaratory relief, burden rested on plaintiff to establish allegations of its complaint. Code Civ.Proc. § 1981.

2. Alteration of Instruments 🔑27(3)

In declaratory relief action for construction of a sublease, where plaintiff alleged that one clause in original sublease was by agreement stricken out and another clause substituted in lieu thereof, plaintiff under the statute was required to account for the alteration as against contention that, since it was evident that change was made, the time and place of making such alteration was immaterial. Code Civ.Proc. § 1982.

3. Landlord and tenant 🔑80½

Evidence disclosing that, after original sublease was executed and after written approval in that form by owner, there was some discussion, to which owner was not a party, in regard to making rental terms more favorable to sublessees by changing computation from a monthly to a yearly basis, but no modified sublease was ever submitted to owner, and that at some unknown time and place some unidentified person attached to sublease a new page concerning rental terms and crossed out original provisions as to rental terms, did not sustain conclusion that substituted page constituted the true sublease and that original page was merely a mistake in sublease.

4. Landlord and tenant ⚷76(4)

Lessor, which prohibits subleasing without its consent, does not have burden at its peril to ascertain whether lessees and sublessees, behind its back and without its stipulated approval, cross out an important page of original approved sublease and substitute therefor some provision deemed more advantageous to sublessees.

5. Principal and agent ⚷178(1)

Where lessor authorized lessee to collect rent under a pre-existing sublease and to pay lessor a percentage of such rents collected, lessee was not the representative of lessor in any other capacity and knowledge of lessee of an attempted modification of terms of sublease was not knowledge of lessor, so as to establish a ratification by lessor of modification of a sublease.

6. Landlord and tenant ⚷76(4)

Constructive consent or approval by lessor in respect to alleged modification of sublease could be established only by clear evidence.

7. Judgment ⚷19

A judgment may not rest upon probabilities, conjecture, or vague inferences concerning what a given situation might or should have been.

◆

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Declaratory judgment action by Roadside Rest, Inc., against the Lankershim Estate and others for a determination of which of two clauses of sublease governs computation of rent. From a judgment for plaintiff, defendants appeal.

Reversed with directions.

Walker, Adams & Duque, of Los Angeles (Irving M. Walker, and Mark Mullin, both of Los Angeles, of counsel), for appellant Lankershim Estate.

Aaron Sapiro and Samuel De Groot, both of Los Angeles, for appellants John Drew and Variety Beach Club, Inc.

Lee Combs, of Los Angeles, for respondent.

DORAN, Justice.

The present action seeks declaratory relief concerning certain provisions of a sublease under which Roadside Rest, Inc. operated a restaurant. The controversy involved an alleged modification of such sublease, changing the computation of rent from a monthly to a yearly basis as determined by gross income. The primary defendant is the Lankershim Estate, owner and lessor of the property, all rights of the other defendants being derivative therefrom. On April 10, 1941, the Lankershim Estate leased to Carlyle Nibley and Hal G. Mors, a piece of property extending about 1200 feet on Roosevelt Highway, Santa Monica, California, for a 25 year period, the lease containing a covenant against subletting "without first obtaining written consent of Lessor," and providing that "any sublease made otherwise would be voidable at the option of Lessor." The complaint states that on June 16, 1941, Nibley and Mors, the original lessees, subleased the north 100 feet of this property for 15 years to John E. Burns, John Drew and Henry Anderson, the subleasing being approved by the Lankershim Estate. About June 17, 1941 this sublease was assigned to Roadside Rest, Inc., in which corporation Burns, Drew and Anderson were interested. Some three months later Drew sold his interest therein; somewhat later Anderson sold out, and Roadside Rest was thereafter operated by Mr. and Mrs. Burns. On December 30, 1941, the original lease from the Lankershim Estate to Nibley and Mors was terminated by court action, and on December 30, 1941, a new lease of the entire property was made by the Lankershim Estate to John

Drew, subject, however, to the "sublease dated June 16, 1941," covering the Roadside Rest property. Under the terms of this new lease, the lessee Drew was to collect rent from the sublessee, and to remit 25% thereof to the Lankershim Estate. This new lease was assigned by Drew to the Variety Club. The complaint further alleges that about July 18, 1944, John Drew and the Lankershim Estate demanded certain additional rent from Roadside Rest, Inc., in the amount of $3372.21, basing such claim upon the original clause 2 of the sublease, which provision respondent claims was modified by the substitution of a new clause 2, evidenced by an additional sheet attached to the sublease.

The original sublease covering the Roadside Rest property, was prepared in the office of Walker, Adams & Duque, attorneys for the Lankershim Estate, and following the signatures of the contracting parties, is found the written approval of the Estate, signed by Irving Walker, the Estate's director and vice president. Paragraph 2 of this sublease, as originally drawn, provided that the sublessees should pay to the sublessors the sum of $3000.00 annually on the first day of July; further, that monthly thereafter, "Sublessees shall compute their gross receipts for the preceding calendar month. In the event that nine per cent (9%) of said gross receipts exceeds the sum of Two Hundred Fifty Dollars ($250.00), then on or before the 10th day of each such month Sublessees shall pay to Sublessors the difference between Two Hundred Fifty Dollars ($250.00) and said nine per cent (9%) of such gross receipts." Page 2 of Plaintiff's Exhibit 1, containing this provision, appears to have been crossed out by two diagonal lines, and at the right hand margin thereof is written with pen, "6–17–14," below which are the initials, "C N" (for Carlyle Nibley), "H G M" (for Hal G. Mors), "J D" (for John Drew), "J. E. B." (for John E. Burns), and "H A" (for Henry Anderson). No initials appear thereon other than those named above, and there is no documentary evidence, by initialing or otherwise, indicating that the Lankershim Estate acquiesced in this alteration.

Attached by staples to the sublease and just preceding the original Page 2 crossed out as hereinbefore mentioned, is an additional or substituted Page 2 which appears to have been written on a typewriter different from that used in preparing the original Page 2 and the rest of the sublease. This substituted Page 2 is not initialed by anyone, nor does any date appear thereon. A material change in rental terms is provided for in the substituted Page 2, which stipulates that the minimum annual rent shall be $3000, and that "(b) The overage of 9% of the gross receipts of the Sublessees' business shall be payable at the expiration of each year unless as hereinafter provided"; thereafter providing that the sublessees shall monthly "compute their gross receipts for the preceding calendar month; In the event that the 9% of the gross receipts at any time exceeds the minimum rental of $3000.00, then on or before the 10th day of the following month, the Sublessees shall pay to the said Sublessors 9% of such gross receipts until the end of the year." The practical effect of this change, according to the appellant Drew's opening brief, "is to transform a monthly excess, as provided in the original clause 2, to an excess calculated on the annual basis."

The actual controversy giving rise to the action for declaratory relief is, in the language of respondent's brief, "over the question as to whether clause 2 of the sublease as originally proposed or the substituted clause 2 is in effect and governs the measure of rent under the sub-lease." The trial court found that the substituted clause 2 was the "true sub-lease," which "was and is the agreement between the parties thereto as executed on or about the 16th day of June, 1941, and as has remained in force since its execution." The original clause 2 is denominated by the trial court the "mistaken sub-lease." The court further found "That the defendant The Lankershim Estate has not given its written consent to said true sublease, but said defendant, at or about the time of the execution of said true sublease, had knowledge that a sublease had been executed between the parties to the true sublease and gave its written consent to a sublease which it then believed to be the sublease between said parties and which sublease so consented to by said defendant was in words and terms identical with the true sublease excepting as to Clause 2 thereof involving the consideration for the lease." Paragraph XIII of the Findings of Fact states: "That since August, 1941, the defendant The Lankershim Estate, * * * has known that the Roadside Rest, Inc. claimed possession of the Roadside property under a lease different as to paragraph 2 thereof from the mistaken sublease; that * * * The Lankershim Estate either has known of the existence of the true sublease * * * or has been put on inquiry to learn the facts with respect to said tenancy and to learn of said true sublease and the terms thereof." There are also findings to the effect that defendants never "gave Roadside Rest, Inc. notice of an election to declare said true sublease void for want of the written consent of The Lankershim Estate or for any other cause"; that the defendants "accepted and received the rentals under the terms and conditions of the * * * true sublease * * * from August, 1941 to July 1, 1944"; and that the defendant John Drew at all times knew of "the existence and of the terms of said true sublease."

It is the appellants' contention that the findings of the trial court "are contrary to the pleadings and the evidence and do not support the judgment" holding that the substituted page 2 of the document in question constituted the "true sublease," and that the defendants knew or should have known of the substitution and acquiesced therein. It is particularly urged that the finding to the effect that the Lankershim Estate is bound by a constructive consent to the so-called "true sublease" or substituted page 2, is not supported by the evidence. Briefly, therefore, this appeal is concerned with two basic questions: (1) What was the real sublease entered into on or about June 16, 1946?; and (2), Did the Lankershim Estate, owner and lessor, by reason of its knowledge or otherwise, give constructive approval of the modified sublease? The correct answers to these questions obviously depend upon the state of the record.

[1, 2] At the outset it is well to note the fundamental proposition, reiterated in Section 1981 of the Code of Civil Procedure, that "The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side." In the present case, obviously, the burden rested on the plaintiff, Roadside Rest, to establish the allegations of its complaint. Moreover, in Paragraph IX of that complaint, it is directly alleged that on or about June 17, 1941, "with the knowledge, consent, acquiescence and approval of the Lankershim Estate and its duly authorized agents and representatives, the section known as clause 2 * * * was stricken out and in lieu thereof was substituted" the modified clause 2 changing the overage rental terms from a monthly to a yearly basis, as hereinbefore mentioned. This allegation concerning an alleged alteration of the original document makes applicable Section 1982 of the Code of Civil Procedure which provides that "The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration." That the provision known as clause 2, changing the rental basis, is material, there can be no doubt. The burden, therefore, of establishing that the substituted clause 2 represented the true agreement, and that the Lankershim Estate in some manner approved this important alteration, clearly rested upon Roadside Rest, Inc.

It is to be observed that the record furnishes no satisfactory answers to the important questions as to who actually prepared the substituted page 2 and as to the exact time when this substitution was made. The respondent dismisses this inquiry with the observation that since it is evident that the change was made, the time and place of making such modification is immaterial. It is impossible to accede to this proposition; the time of alteration and the circumstances connected therewith, are of the utmost importance in determining the validity of the alleged modification and the owner's approval thereof. John Drew, one of the original sublessees testified: "When I signed that lease, there were no changes or marks"; that there was some conversation concerning a change, but that no document was ever presented embodying any change; that Mr. Charlesworth, the broker, about a week or ten days later, asked Drew to initial "the page you want to have changed, I will take it up with Mr. Nibley and Mr. Mors (sublessors), and see if I can get the change you desire to have made"; that Drew never saw the alleged substituted page 2 until about a year before the trial. Drew further testified that the initialing and crossing out of the original page 2 was done in the belief that the change, if any, would be effected "with the consent of the Lankershim Estate and our initials on it." Harold G. Mors, original sublessor, first testified that at the time the original page 2 was initialed, the substituted page 2 was stapled on to the sublease. However, on interrogation by the court, this witness said: "Your Honor, I do not recall whether the main sublease was signed and the change was done afterwards, or whether the change was put on there before we all signed this. I do not recall that." Mors knew "that the consent of the Lankershim Estate was necessary." When later recalled, the witness did not remember about certain lines in the original sublease being crossed out, and said: "I paid no attention to this lease." Cross-examination brought out the fact that the witness did not remember where the document was signed, the time at which it was signed, or whether all of the parties signed it at the same time; or whether the substituted page 2 was stapled to the agreement when it was signed. The witness again stated: "As I said, it is only a guess. I do not remember. I paid very little attention to the lease." Obviously, the testimony of Harold G. Mors is without value in solving the present controversy, and proves nothing. Another witness produced by respondent, Herman Miller, a brother-in-law of John Burns, one of the sublessees, testified that the original sublease was signed "with the promise that the changes would be made, and the new sheet included, with the change, * * * And I was not present when they drew up the last stuff and initialed it, which came at a later date."

One H. F. Metcalf testified to receiving a monthly salary from the Lankershim Estate "as a general expert in real estate matters," although not being an officer or director of the Estate. The broker Charlesworth, who negotiated the sublease in question, used Metcalf's office. Sometime after signing the sublease, according to this witness, Charlesworth told Metcalf "they had made an error, he thought in negotiating their lease; that is, it called for a monthly percentage, which is what all this talk is about, and they wanted a yearly percentage. * * * He came to me to see if I could assist him in getting the lease changed." Metcalf did nothing in that connection, let the matter drop, and did not submit it to the Lankershim Estate. "I had no reason to change it," explained the witness. Metcalf further stated: "I negotiated no changes in that lease, your Honor—none. I had no authority to change it myself." The testimony is also to the effect that Metcalf "never saw it (the substituted page 2) until I saw it the other day." Mrs. Burns, secretary-treasurer of Roadside Rest, testified to sending monthly gross income reports to Drew until July, 1944, thereafter to the Lankershim Estate. Mrs. Burns was not present when the original lease was discussed. John Burns had nothing to do with the lease and did not remember anything. The broker, J. A. Charlesworth testified "I do not recall it (initialing of page 2) sufficiently to testify." First testifying that the documents "were altered in escrow, prior to disbursement of the funds," Charlesworth later informed the court that substituted page 2 "was not on the lease when it was delivered," and "To the best of my knowledge there were no additions made to the lease at the time the lease was closed in escrow. I was present at the time. No change was made in connection with the percentage. I do not know of any typewritten sheet such as this being attached to the lease at the time it was completed in escrow"; that the witness was not present when the initialing or marking of the sheets was done.

Finally there is the testimony of Irving Walker, vice president and director of the Lankershim Estate, that at the time the Estate's written approval was appended to the sublease and signed by Walker, no portion was crossed out, nor did any initials appear on the margin. "I have a very definite recollection," said Mr. Walker, "that the provision in the sublease at the time I gave my consent to it was * * * to the effect that the percentage of the rent should be calculated on a monthly basis," and that no person ever asked Walker, as an official of the Lankershim Estate, to amend the sublease. Mr. Walker's office prepared the sublease, and the witness testified: "it has been my uniform requirement that the signatures to documents which were to be signed by the Lankershim Estate and other parties be signed by the other parties before I signed for the Lankershim Estate." Mr. Walker further testified that Nibley and Mors, original lessees, were "very unsatisfactory tenants," that it was doubtful whether such lessees would be able to perform their obligations; therefore Walker, on behalf of the Lankershim Estate, was interested in a satisfactory sublease, and "was anxious to know that the terms of it (the sublease) had been agreed upon in accordance with my understanding of what those terms would be," since if the original lease failed, under provisions of the sublease, the sublessees would then become the direct tenants of the Lankershim estate.

[3] The trial court's conclusion that the substituted page 2 of the document constituted the "true sublease," and that the original page 2 was merely a "mistaken sublease," is not supported by the record. All that the evidence shows in respect to this matter, is that after the original sublease was executed, and after written approval in that form by the Lankershim Estate, there was some discussion to which the Estate was not a party, in regard to making the rental terms more favorable to the sublessee, by changing the computation from a monthly to a yearly basis. But the fact remains that no modified sublease embodying any such proposed charge was ever presented to or approved by the Lankershim Estate, and the trial court found that the Estate "has not given its written consent to said true sublease" (the modified sublease). The most that is indicated by the evidence is that at some unknown time and place, some unidentified person prepared and attached to the document a new page, crossing out the original provisions as to rental terms. Any sublease negotiated, was without value except as its terms were approved by the Estate, and the only conclusion justified under the evidence, is that the original and not the substituted rental provision, represents the only agreement actually made, executed and approved. The law quite definitely provides how a lease or other contract may be changed, Section 1698 of the Civil Code specifying that "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise".

[4] The further question whether the Lankershim Estate, although not giving written consent, nevertheless in effect approved the alteration by reason of some knowledge "of the existence of the true sublease," in the language of the trial court's finding, or because the Estate had "been put on inquiry to learn the facts with respect to said tenancy and to learn of said true sublease and the terms thereof," must likewise be resolved in favor of the appellants. The record discloses no circumstances indicating either actual or constructive knowledge or approval of anything other than the original sublease approved in writing. To hold otherwise would seem to place upon the Lankershim Estate a burden to ascertain at its peril, whether lessees and sub-lessees had, behind its back and without the stipulated approval, crossed out an important page of the original sublease and substituted therefor some provision deemed more advantageous. This cannot be the law. The evidence of such an alteration and its approval should not rest upon supposition, nor upon the fact that several years after execution of the original sublease, a new page containing a vital alteration in the rental terms, is found to have been attached to the document by some unknown person, at some unknown time and place.

[5, 6] Respondent's brief suggests that the Lankershim Estate knew of the alteration because of the fact that John Drew, originally sublessee and later a lessee of the Estate, "was for a period of years the agent of the Lankershim Estate for the collection of the rent." It is true that, as a matter of convenience Drew was au-

thorized to collect rent from the sublease, and in the final leasing arrangement Drew was required to pay to the Lankershim Estate 25% of the rent collected from Roadside Rest, Inc. The arrangement, however, was nothing more than this, and Drew was no more the representative of the owner than is any other lessee; the fact can in no manner affect the present controversy. The respondent, further, would impute knowledge and approval to the Lankershim Estate by reason of the acceptance of rent which respondent says was "computed on the basis of the modified draft". But, as said in the brief of the Estate, whatever rent came to it was merely accepted under the justifiable belief that the original sublease, which was the only agreement ever approved, represented the only existing sublease. Obviously, had the Estate been advised that the rental terms had been modified, some appropriate action would have been taken. Ratification requires knowledge and the record discloses nothing of this nature. To say that the Estate owed some kind of a duty to obtain this knowledge is to again indulge an unwarranted assumption amounting to a reversal of the burden of proof. Constructive consent or approval in respect to the alleged modification is much too important a matter to rest upon anything other than clear evidence.

[7] The respondent further suggests that "the great probabilities are" that the Lankershim Estate's copy of the sublease, not produced in court, "contains the identical alterations" contended for by respondent. Here again is an attempt to justify the judgment on the ground of probabilities. Moreover, as pointed out in the Lankershim reply brief, the photostatic copy of the sublease reveals that the sublease was "made and entered into in duplicate," and both of the executed and approved copies of the sublease were before the court as Exhibits 1 and 7. So far as probabilities are concerned, inferences unfavorable to respondent's contentions might likewise be suggested from the fact that two of the original five parties to the controversial sublease were not called as witnesses, namely Mr. Carlyle Nibley and Mr. Henry Anderson. However, as hereinbefore mentioned, a judgment should not rest upon probabilities, conjecture or vague inferences concerning what a given situation might or should have been.

For the reasons hereinbefore expressed, the judgment is reversed with directions to enter a judgment declaring that the original sublease without modifications, as approved by the Lankershim Estate in writing, is the only valid and subsisting sublease, and that such original sublease governs the rights of the parties thereto and those claiming under them.

YORK, P. J., and WHITE, J., concur.

Hearing denied; SHENK, CARTER, and SCHAUER, JJ., dissenting.

LOVETT et al. v. BELL et ux.*

Civ. 15449.

District Court of Appeal, Second District, Division 2, California.

Oct. 2, 1946.

Hearing Granted Nov. 26, 1946.

1. Landlord and tenant 🔑278½
War 🔑4

In action by owner of motor hotel to evict lessee, evidence sustained findings that lessee had for valuable consideration agreed that he would not have any interest in hotel after expiration date of lease notwithstanding maximum rent regulation, that demand was made for possession at expiration of lease, that withholding by lessee was intentional, and that no relationship of landlord and tenant existed after expiration of lease.

2. Landlord and tenant 🔑278½
War 🔑4

Where lessee of motor hotel in consideration of lessors' waiver of their right to sell hotel and oust lessee agreed that lessee would not have any interest in hotel after expiration date of lease notwithstanding maximum rent regulation, successful prosecution of eviction action did not require service upon area rent director of written notices of proposed eviction as provided by O.P.A. regulations. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 901 et seq.

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* Subsequent opinion 180 P.2d 335.

3. Landlord and tenant ⚷278½
War ⚷4

The owner of motor hotel was entitled to judgment evicting lessee who in consideration of owner's waiver of right to sell the hotel and oust lessee agreed that lessee would not have any interest in hotel after expiration date of lease notwithstanding O.P.A. maximum rent regulation. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 901 et seq.

4. Estoppel ⚷63

One with full knowledge of the facts will not be permitted to act in manner inconsistent with his former position to injury of another.

5. Estoppel ⚷92(2)

A party who has accepted benefits of an agreement must bear the burdens thereby imposed upon him. Civ.Code, § 3521.

6. Landlord and tenant ⚷278½
War ⚷4

Where lessee of motor hotel promptly following his execution of modification agreement whereby for valuable consideration lessee agreed not to have any interest in leased premises after expiration of date of lease notwithstanding O.P.A. maximum rent regulation, sued to recover money paid, such conduct was a fraud which nullified all rights of lessee asserted to have arisen thereunder and hence lessor was entitled to judgment evicting lessee. Civ.Code, § 172.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Clyde A. Lovett and another against R. H. Bell and wife to evict the defendants from occupancy of a motor hotel and to recover damages. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Louis Ballenger, of Glendale, for appellants.

Henry E. Bianchi, of Los Angeles, for respondents.

MOORE, Presiding Justice.

The question for decision is whether the owner of a motor hotel consisting of 12 units is entitled to a judgment evicting a lessee who has for a valuable consideration agreed that he will not have any interest in the leased premises after the expiration date of the lease, despite the "Maximum Rent Regulation" for housing promulgated by the federal Office of Price Administration (OPA) as authorized by the federal Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

Judgment evicting defendants and awarding damages for withholding having been entered, the matter comes here on appeal.

In September, 1940, by a writing respondents leased their motor hotel in Glendale for the term of five years ending September 30, 1945, for a total rental of $12,000, the first month and the last 15 months payable in cash, the balance payable in equal monthly installments. The lessee promptly assigned the lease to appellant R. H. Bell who apparently then and at all times thereafter acted on behalf of both himself and his codefendant. By paragraph Sixth of the lease "lessee shall have an option for the rental of said premises, upon the expiration of the lease, for an additional period of five years, upon the same basis, terms and conditions provided for herein." By paragraph Seventh, "Lessor shall have the right, and shall be permitted to sell the said premises at any time during the term of this lease, but upon such sale the said lessees shall be entitled to receive from the said lessor all unearned rental, and upon such sale the said lessor shall pay to the lessees any and all rentals then unearned."

On May 3, 1944, by a written instrument the parties so modified the lease that appellants relinquished the "right to the exercising of an option beyond the 30th day of September, 1945, and by these presents give up all right to said option and will not have any interest in said leased premises above described after the 30th day of September, 1945," and respondents "relinquish their right to sell said premises free and clear of said lease prior to the expiration of said lease. * * *"

Anticipating that they would be requested to vacate the premises on the expiration date of the lease on September 25, 1945, appellants forwarded to respondents $200 as rent "for calendar month October, 1945," and in a letter suggested that "a tenant has some rights." The prompt reply to such communication was a return of appellants' check with a declaration that the latter's continued occupancy after September 30 would result in an action of ejectment. Without observing the formalities prescribed by the "Maximum Rent Regulations" and the federal "Price Control Act," hereinafter referred to as the Act, respondents filed their complaint herein on October 11, 1945, and following a trial, findings and decision and judgment were filed on November 20, 1945. Inasmuch as all legal questions raised at the trial and by the appeal are involved in the trial court's decision on the merits, a consideration of the sufficiency of the evidence to support the findings and of the findings to support the judgment will dispose of all assignments.

The Findings.

The findings of the court material to this discussion are that the lease was so modified by the writing of May 3, 1945, that appellants relinquished to respondents all rights to remain upon the leased premises and they have no interest therein; that prior to September 30, 1945, demand was made upon appellants for possession at the expiration of the lease; that the withholding was deliberate, intentional and wilful despite appellants' knowledge that their right to possession had terminated; that the reasonable value of the use of the premises by appellants after September 30, 1945, is $904 which is the amount of respondents' damage; that while the premises are situate within a defense rental area, no relationship of landlord and tenant existed after September 30, 1945, and the Rent Director of the OPA has no jurisdiction over the subject matter of the action.

The Evidence Supports the Findings.

[1] The consideration passing to appellants by the modification agreement was the right of unmolested occupancy to the expiration of the lease. For that they paid respondents $1250 and yielded a complete surrender of the premises to become effective when their right of possession should terminate. Appellants promptly sued respondents to recover the money paid with penalties as having been received in violation of the "Maximum Rent Regulation." Judgment against them on that claim was recently affirmed. Bell v. Lovett, 75 Cal. App.2d 883, 171 P.2d 758.

Inasmuch as the "Maximum Rent Regulation" was in effect when appellants agreed that they would "not have any interest in said leased premises * * * after the 30th day of September, 1945," the inference was fairly deducible that appellants agreed to yield possession and to surrender all rights thereto on the 30th of September and not to attempt to continue their occupancy with the aid of the Rent Administrator. Such inference is reasonable and is supported by the testimony of Mr. Bell that he effected the modification agreement in order that he might have security in his occupancy of the hotel for the full term of the lease. Demand for possession was proved by the letter of respondents to appellants and the reply thereto. The withholding was not denied but the continued occupancy despite the agreement and notice to quit on September 30 was proof that the withholding was deliberate and wilful. The amount of damages awarded, $904, was established by Mr. Lovett's testimony that the daily net income from the property was $29. While the findings (1) that no relationship of landlord and tenant existed after September 30, 1945, and (2) that the Rent Director has no jurisdiction over the controversy are primarily legal conclusions, yet the factual features of such declarations are established by the clear, simple, unequivocal language of the modification agreement and by the aforementioned testimony of Mr. Bell. Appellants' stipulation that they "will not have any interest" in the hotel after September 30, 1945, was their own supreme prior adjudication of any possible claim to retain possession they might thereafter assert. If a total renunciation of interest in the property be not the fact established by the language of the agreement then the art and custom of reducing to writing the understandings of men might as well be cast into the discard.

The Findings Support the Judgment.

Notwithstanding the agreement of May 3, 1944, appellants contend that, by virtue of the Maximum Rent Regulations promulgated by the office of Price Administration pursuant to the Price Control Act of 1942, they cannot be evicted unless the complaint allege, and proof be made of, a full compliance with such Rent Regulations, and not at all if it be shown that the facts bring the case within the purview of section 6(a) which reads as follows:

"Restrictions on Removal of Tenant. *So long as the tenant continues to pay the rent to which the landlord is entitled,* no tenant shall be removed from any housing accommodations, by action to evict or to recover possession, by exclusion from possession or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that such tenant *has no lease or that his lease or other rental has expired or otherwise terminated, and regardless of any contract, lease, agreement or obligation heretofore or hereafter entered into* which provides for entry of judgment upon tenant's confession for breach of covenants thereof or which otherwise provides contrary thereto, unless: * * *"

(Then follow exceptions, none of which was pleaded or otherwise presented or considered in the court below.)

The nearest approach to the facts of this case found among the cited authorities or any others that are available is Bowles v. Strano, 62 F.Supp. 9, decided by the United States District Court of Pennsylvania. The owners having sold their property February 24, 1945, exacted the concession that they might remain in the house for one month by paying a rental of $110. Because of unavoidable delays title was not delivered until July 3, when vendees paid the purchase price and agreed that vendors might remain until August 1, 1945. They refuse to vacate on the latter date whereupon the purchasers filed their action in ejectment in the Court of Common Pleas. Price Administrator Bowles then sought an injunction to compel the latter court to strike from its records "the alleged unlawful judgment." The federal court found that no interest of the United States was adversely affected by the eviction order and held (1) that while the agreement of the parties was described in part as a lease its actual character was an agreement not under the jurisdiction of the OPA or of the Area Rent Director; (2) that having formally agreed to deliver possession on August 1, vendors were estopped from invoking the powers of the OPA or of the Area Rent Director to enable them to violate their contract and maintain possession. Also, that court refused "to exercise its equitable jurisdiction to the ultimate benefit of vendors who are trying to ignore their agreement," and held that "the effect of an injunction would be to aid a violator of an agreement and to further injure the other party to it."

The purposes of the Act were to secure the effective prosecution of the recent war, to stabilize prices, eliminate profiteering, hoarding, speculation and other deceptive practices. 50 U.S.C.A.Appendix, § 901. Its purpose was not to interfere with contracts made in good faith with respect to a business property but on the contrary the Act itself specifically provides that any rental agreement "shall remain in force pursuant to the terms thereof except so far as those provisions are inconsistent with this Maximum Rent Regulation." Defense Rental Area Maximum Rent Regulation No. 54a, sec. 1388.331 (c). In view of the purposes of the Act it is inconceivable that a person who confesses that he has no interest in a property within a defense rental area could justifiably assert in a judicial proceeding that he is entitled to resist eviction under the provisions of section 6(a). Neither did the Administrator purpose to extend protection to a claim such as that of appellants nor did Congress intend that such a regulation would be promulgated. Neither the Administrator nor the Congress could have conceived that two persons capable of contracting should be deprived of the right freely to make engagements concerning any property so long as the Maximum Rent Regulations should not thereby be violated. Especially it could not have been intended that a person under the guise of retaining a place of habitation might withhold a profitable business enterprise from its owner after the expiration of the right of possession.

[2] Because of such intention, because appellants had no interest in the premises upon the expiration of the lease and because the interests of the United States were not to be affected by the eviction of appellants, a successful prosecution of the action did not require service upon the Area Rent Director of the written notices of the proposed eviction as provided by Section 6 (d) (1) of the Regulations or compliance with any other procedural form. Certain authorities cited by appellants in support of such contention (Johnson v. Swanson, Super.Ct.Wash.1943, Vol. 1, Pike and Fisher OPA Service, p. 1799; Brown v. Wright, 4 Cir., 137 F.2d 484; Wilber v. Falske, Super.Ct.App.Dept.Cal., 1 Pike & Fisher OPA Service, p. 2,007; Hamrick v. Dufford, 71 Ohio App. 552, 50 N.E.2d 566; Kirschbaum v. Mobley, 12 Ohio Supp. 6; Tyczynski v. Soens, Cir.Ct.Ind., 1 Pike & Fisher OPA Service, p. 1961; Brown v. Lee, D.C., 51 F.Supp. 85) are not applicable here. Each of them refers to a definite relationship of landlord and tenant and each holds that a failure to follow the procedure prescribed in the Maximum Rent Regulations was nothing short of attempted nullification of a valid federal statute, enacted as an aid to the prosecution of the war.

Appellants were not "tenants without a lease," referred to in the "Restrictions on removal of tenant," because they were not entitled to possession. Sec. 6 (a). Neither were respondents landlords as defined in section 13 (a) (8) because they were not "entitled to receive rent for the occupancy" of the hotel from appellants after the expiration of the lease. The authorities cited by appellants (Tracy v. Hailey, Super.Ct. App.Dept.Cal., 1 Pike and Fisher, p. 1781; Long Branch Banking Co. v. Howland, 133 N.J.Eq. 315, 32 A.2d 860; Home Savings Bank of City of Albany v. Hunter, 180 Misc. 1, 42 N.Y.S.2d 557) in support of their contention that they were tenants and entitled to the protection of section 6 (a) are readily distinguishable. The Tracy case was an unlawful detainer action and "judgment * * * should have been for the plaintiff unless the restrictions of section 1388.286 of Maximum Rent Regulation 53 * * * apply." The other two cases resulted from the attempts of purchasers of rental properties at lien foreclosure sales to oust the tenants in possession. The intervention of the Administrator was upheld because the tenant of the debtor became the tenant of the purchaser who acquired the property subject to existing liens. In each instance the tenant occupied a single family residence and had not waived the benefits of the Regulation. Also, in both instances they were tenancies at will which had not been terminated. Finally, in the last mentioned cases the enforcement of the Act did not result in assisting the occupant to breach a contract.

[3-5] In the present action a reversal of the judgment would be to supplant order with disorder, honor with dishonor and a solemn obligation with audacious repudiation. Having definitely contracted to free the leased premises of all claims of right to possession on a day certain and having received the specified consideration for such agreement, appellants will not be permitted to deny their own commitment on which confident reliance had been placed by respondents. It is a principle of common honesty that a person may not violate his solemn obligations. It is likewise the law that one with full knowledge of the facts shall not be permitted to act in a manner inconsistent with his former position to the injury of another. Harlan v. Harlan, 70 Cal.App.2d 657, 662; 161 P.2d 490; In re Bruce's Estate, 27 Cal.App.2d 44, 80 P.2d 82. Having accepted the benefits of an agreement a party thereto must bear the burdens thereby imposed upon him. Civil Code, sec. 3521; Estate of Bruce, 27 Cal. App.2d 44, 50, 80 P.2d 82, supra; Schramm v. Burkhart, 137 Or. 208, 2 P.2d 14, 16.

[6] Furthermore, appellants are forestalled by their own fraud impliedly found by the court below. Promptly following their execution of the modification agreement they instituted their action to recover the money paid for their "security" in the occupancy of the hotel for the full term

of the lease. By virtue of such action and of their contentions in the present proceeding the trial court was warranted in concluding that at the time of entering into the modification agreement appellants had no intention of performing its terms. Such conduct was a fraud (Civil Code, sec. 172), and it nullified all rights of appellants asserted to have arisen thereunder.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

TOMLIN et al. v. CALIFORNIA EMPLOYMENT COMMISSION (two cases).*

Civ. 13102, 13103.

District Court of Appeal, First District, Division 2, California.

Oct. 21, 1946.

Rehearing Denied Nov. 20, 1946.

Hearing Granted Dec. 19, 1946.

Taxation ⚷59

Where lessees of amusement machinery were free to do as they pleased and each worked as few or many hours as he wished with no requirement that he must produce any fixed result and either did all the work himself or hired helpers whom he paid and lessor exercised no control, gave no instructions, and had no right to discharge any of the lessees or any of the helpers hired by lessees, lessees were "independent contractors" rather than "employees" and lessors were not obligated for unemployment insurance contributions. Gen.Laws, Act 8780d.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

Appeal from Superior Court, San Francisco County; Thomas M. Foley, Judge.

Separate actions by C. H. Tomlin and others, doing business under the fictitious firm name and style of Rex Novelty Company, against California Employment Commission, sometimes called the Unemployment Reserves Commission, to recover separate sums collected as contributions under the Unemployment Insurance Act. which actions were consolidated. From adverse judgments, plaintiffs appeal.

Reversed with directions.

B. E. Kragen, of San Francisco, and Lionel B. Benas, of Oakland (Hillard Goldstein, of San Francisco, of counsel), for appellants.

Robert W. Kenny, Atty. Gen., Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for respondent.

NOURSE, Presiding Justice.

The plaintiffs filed two actions against defendant for the recovery of separate sums collected as contributions under the California Unemployment Insurance Act. Deering's Gen.Laws, Act 8780d. The actions were consolidated for trial, but two separate judgments were entered. An appeal was taken from each, but thereafter the parties returned to the consolidation and filed one reporter's transcript and one set of briefs to cover the two appeals. The difference between the cases goes only to the amount of taxes paid, hence they may be treated as one appeal.

Rex Novelty Company is a partnership, consisting of C. H. Tomlin and others, which owns amusement machines known as "crane" or "digger" type machines. During the taxable years in question the company entered into agreements with various individuals who were denominated lessees for the operation of such machines at places chosen by the lessees. Each agreement provided that it was an agreement "of strict rental only, and shall in no way be construed or considered as creating the legal relationship of a partnership, or the legal relationship of principal and agent, or the legal relationship of employer or employee." Each agreement was for an indefinite period of time to extend until terminated by either party upon written notice to the other party of the intention to so terminate. The lessees agreed to lease a specified number of these machines and to devote their time exclusively to their operation unless it was otherwise agreed in writing. The lessees placed the machines in various locations chosen by themselves and gave the "location owner" a specified percentage of the money collected after deducting the cost of any merchandise vended from the machine. The residue was then divided between the Rex Novelty Company and the lessees. The lessees had employees, denominated operators, who did the collecting and made minor repairs on the machines. Each operator was required to get a signed receipt from the location owner as to the amount he received. The lessees were required to send these receipts and a report of the location and amount taken in by each machine to the Rex Novelty Company each week on a form prepared by it. One of the partners of the company visited the various territories to see if the machines were properly located, and if the machines were not bringing in sufficient revenue the lessee was advised to either change its location or to return the machine and relinquish his lease.

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* Subsequent opinion 180 P.2d 342.

The California Employment Commission assessed taxes on the ground that the Rex Novelty Company was an employer. On December 31, 1942, the Rex Novelty Company paid $809.40 and $7,027.80 under written protest. On June 15, 1943, a hearing was had before a referee who found in favor of the commission. The Appeals Board then approved the assessment. The Rex Novelty Company then instituted the present proceedings in the superior court. The trial court held that it was an employer as defined by the act and entered separate judgments in favor of the commission.

The judgments are contrary to all the authorities and must be reversed. Empire Star Mines Co. v. California Employment Com., 28 Cal.2d 33, 168 P.2d 686; Briggs v. California Employment Com., 28 Cal.2d 50, 168 P.2d 696; Twentieth Century Lites v. California Dept. of Emp., 28 Cal.2d 56, 168 P.2d 699; California Employment Stabilization Com. v. Morris, 28 Cal.2d 812, 172 P.2d 497; California Employment Stabilization Com. v. Gusmeroli, 75 Cal.App.2d 735, 171 P.2d 913; Isenberg v. California Employment Stabilization Com., — Cal.App.2d —, 172 P.2d 527; California Employment Stabilization Com. v. Wirta, 75 Cal.App.2d 739, 171 P.2d 728.

The facts to be taken into consideration in determining whether one who performs services for another is an employee or an independent contractor are outlined in detail in the Empire Star Mines case, supra, and it would serve no purpose to repeat them here. More closely allied in its facts is the Briggs case, supra, and we could rest our opinion on a slight paraphrase of the language of that case found on page 698 of 168 P.2d: The uncontradicted evidence concerning the contracts and the operations carried on pursuant to these agreements clearly shows that the appellant had no right to control nor did it in practice control the manner or means by which the lessees operated the machines delivered to them. Each of them was free to do as he pleased. He worked few or many hours with no requirement that he must produce any fixed result. He received no instructions; he did all the work himself or hired helpers whom he paid. The appellant had no right to discharge any of the lessees nor any of the helpers hired by the lessees. Under these circumstances in every respect these lessees were independent contractors.

The judgments are reversed with directions to enter judgment in both cases for appellants.

GOODELL and DOOLING, JJ., concur.

76 Cal.App.2d 610

LAINE v. WEDDELL et al.

Civ. 3418.

District Court of Appeal, Fourth District, California.

Oct. 24, 1946.

1. Automobiles ⚷244(44)

Evidence was insufficient to show that following motorist, who collided with preceding motorist at intersection, failed to sound horn when attempting to pass.

2. Automobiles ⚷244(44)

A following motorist on a through highway who collided with preceding motorist at intersection, was not contributorily negligent in driving at speed in excess of 15 miles per hour, since under statute the permissible speed was 55 miles per hour, whether or not intersection was obstructed. Vehicle Code, §§ 82.5, 471, 510, 511(a) (4).

3. Appeal and error ⚷989

Where the trial court made a specific finding of two probative facts from which it drew conclusion that defendant was contributorily negligent, but made no ultimate independent finding of contributory negligence, and probative facts were either unsupported by evidence or did not constitute negligence in and of themselves, whether the record might disclose other acts of the defendant which might constitute contributory negligence would not be considered on appeal.

4. New trial ⚷9

A defendant was entitled to new trial on his cross-complaint, where trial court's ultimate conclusion that defendant was contributorily negligent was based upon a false premise.

5. Trial ⚷377(2)

A motion to take additional testimony would be dismissed where the evidence sought to be produced by the motion had been supplied by stipulation.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action for damages sustained in automobile collision by Gus Laine against W. H. Weddell and others, and Bering Monroe, who filed a cross-complaint. From a portion of the judgment, Bering Monroe appeals.

Reversed.

Martin J. Coughlin and W. H. Weddell, both of San Bernardino, for appellant.

Duckworth, Mussell & King, of San Bernardino, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent Gus Laine, hereinafter referred to as plaintiff, filed this action for damages against defendant and appellant Bering Monroe (hereinafter referred to as defendant) and against his employers, defendants W. H. Weddell et al.

Defendant Monroe was driving a Lincoln coupe westerly from San Bernardino toward Los Angeles approximately 12 miles east of Ontario along Valley Boulevard on the north shoulder thereof. That boulevard runs east and west and is a through highway as defined by sections 82.5 and 471 of the Vehicle Code. The paved portion thereof is divided into three traffic lanes, each 10 feet in width. There is a macadam shoulder approximately 6 to 9 feet wide on each outer edge of the pavement. Laine was driving his Chevrolet in the same direction but several hundred feet ahead of the Monroe car. Plaintiff, according to his testimony, was traveling at about 25 or 30 miles per hour in the first lane of traffic as he approached the intersection of Valley Boulevard and Calabash Avenue. When he was about 200 yards from the intersection he saw two boys standing on the south side of the highway. He reduced his speed to approximately 10 miles per hour and the boys crossed the boulevard in front of him. While traveling at about 10 miles per hour he entered the intersection above mentioned and he then noticed a lady walking westerly on the north shoulder of the boulevard crossing Calabash Avenue about 6 feet north of the pavement. After he passed the lady he stopped or was stopping to see if she wanted a ride. His car was straddling the white line between the shoulder and the north lane of the highway. About that time defendant's car struck his Chevrolet from the rear.

Defendant, according to his evidence, first noticed plaintiff when he (Monroe) was about 250 feet east of the intersection and about 150 feet behind Laine's car. Laine's car was then traveling with its left wheels on the white line dividing the north and center lanes. At that point Monroe was traveling between 35 and 38 miles per hour and Laine was going about 18 miles per hour. Monroe started to "angle out" towards the center lane to pass the Laine car. When he was about 50 feet from Laine's car plaintiff Laine, without giving any signal or warning, came to an abrupt stop. Defendant immediately applied his brakes and attempted to swerve his car still farther to his left but was unable to avoid a collision. The right front portion of his car struck the left rear portion of plaintiff's car when plaintiff's car was in the intersection. The impact broke the brake-line on defendant's car and it continued on for a distance of about 100 feet. Monroe sustained personal injuries which incapacitated him for a considerable period of time and his automobile was damaged.

On the day in question visibility was good. However, there had been intermittent drizzling rains and the highway was slippery. After trial, without a jury, the court specifically found, in findings apparently prepared by the attorney for defendant and cross-complainant, that on the day in question "* * * the driver of an automobile approaching said Calabash Avenue from the east along said Valley Boulevard, during the last 100 feet of his approach to said intersection, did not have a clear and unobstructed view of the traffic on Calabash Avenue for a distance of 100 feet." In paragraph VI of the findings it specifically found that when in that intersection Laine "brought his automobile to an abrupt stop and gave no signal of any intention to stop"; that defendant Monroe attempted to pass Laine "and did not sound his horn or give any other warning of his intention to pass and, while so attempting to pass said Chevrolet coupe automobile the said Bering Monroe was driving at a speed in excess of 15 miles an hour"; that the manner in which Laine and Monroe drove their cars "as aforesaid, each proximately contributed to a collision" between the two cars. From these specific findings above quoted the court concluded that defendant Monroe, in operating his car "in the manner set forth in said par. VI * * * was negligent"; that "said negligence proximately * * * contributed to said collision * * *."

Judgment was entered that neither plaintiff nor cross-complainant should recover damages.

Defendant Monroe has appealed from that portion of the judgment disallowing him a recovery on his cross-complaint and argues that the evidence does not support the findings and that the findings do not support the judgment. In support thereof he cites Snearly v. Hiestand, 50 Cal.App. 393, 396, 195 P. 272, 273, which states the rule in reference to findings of ultimate facts as follows:

> "The findings of an ultimate fact cannot be overcome by a finding of probative facts, unless it clearly appears that the finding of the ultimate fact is entirely based on probative facts which are destructive of the former, or where it appears that the trial court made the finding of the ultimate fact as a conclusion from the particular facts found. * * *"

Here the trial court made a specific finding of two probative facts, i. e. (1) that Monroe failed to sound his horn when attempting to pass plaintiff's car, and (2) that he was traveling in excess of 15 miles per hour at the time. From those probative facts it drew the conclusion that defendant was guilty of contributory negligence. Under the case cited, then, there remains but one question for this court to determine and that is whether or not there is sufficient evidence to support the two probative findings of fact specified in paragraph VI of the findings and whether such acts, if supported by the evidence, constitute contributory negligence on the part of the defendant.

[1] We have searched the record in vain for any evidence showing that defendant Monroe did not sound the horn on his

car. Plaintiff has not pointed out to this court any evidence supporting that finding. It therefore must be held that the finding "that defendant did not sound the horn," stands unsupported by the evidence.

As to the second probative fact found, defendant testified that he was traveling on Valley Boulevard between 35 and 38 miles per hour and that when he approached the intersection about 40 or 50 feet behind plaintiff's car, he completely applied his brakes, and soon thereafter the right front fender of his car struck the left rear fender of plaintiff's car near the center of the intersection.

From the evidence produced at the trial it was not clear whether Valley Boulevard was, at the time, a through highway, and whether proper stop signs had been erected at the entrance to it.

A motion was made by defendant in this court to produce additional testimony on the subject. The parties hereto have since filed a written stipulation that Valley Boulevard, at the time, was a through highway, as defined by section 82.5 of the Vehicle Code, and that the intersection described in the findings was *not* obstructed as found by the trial court, and that this court may, in the consideration of this appeal, consider the facts as set forth in the stipulation.

[2] Section 511 of the Vehicle Code provides that the speed of any vehicle upon a highway not in excess of the limits provided in said section is lawful unless clearly proved to be in violation of the basic rule declared in section 510 of the Vehicle Code. There being no finding that the basic rule was violated, the permissible speed at the time and place was 55 miles per hour, and consequently a finding that defendant was traveling in excess of 15 miles per hour is not, in and of itself, a violation of the law, nor does it necessarily establish negligence on the part of the defendant.

Whether the intersection involved was one where a driver approaching the intersection from the east did not have a clear and unobstructed view of the traffic approaching from the north is not material under the facts in this case. Subdivision (a) (4) of section 511 of the Vehicle Code specifically provides that the 15 mile prima facie speed limit does not apply "on a through highway", even though the intersection is obstructed.

[3] We must conclude that the probative facts found are unsupported by the evidence or that they do not constitute negligence in and of themselves, and therefore do not support the ultimate finding of contributory negligence specifically based upon those probative facts so found. Whether the record may disclose other acts of the defendant which might constitute contributory negligence on his part cannot be considered on this appeal since there is no ultimate independent finding of contributory negligence.

[4] It is apparent that the trial court was of the opinion that the defendant was limited to a prima facie speed limit of 15 miles per hour at an obstructed intersection, even though the highway was a through highway. If the court's ultimate conclusion that defendant was guilty of contributory negligence was predicated upon this erroneous belief, then the ultimate conclusion must fall because it is based upon a false premise. Under these circumstances, defendant should have a new trial on his cross-complaint.

[5] Since the evidence sought to be produced by the motion to take additional testimony has been supplied by stipulation, that motion will be dismissed.

The portion of the judgment appealed from is reversed.

BARNARD, P. J. and MARKS, J., concur.

76 Cal.App.2d 465

MARTIN et al. v. RAY et al.

Civ. 15094.

District Court of Appeal, Second District,
Division 3, California.
Oct. 14, 1946.

1. **Equity** 🔑39(1)

Equity, once having jurisdiction of subject matter of action, will retain it so that complete adjudication of all conflicting rights may be had and a final determination of all matters in controversy accomplished.

2. **Easements** 🔑61(8)

In action for mandatory injunction to remove tree, ditch and dam from easements conveyed by quitclaim deed by plaintiffs to defendant wherein parties stipulated that legal description of easements as contained in supplemental complaint was deemed denied with right reserved to establish at trial the facts as to what property should properly be included in easements, trial court erred in excluding pleadings and evidence showing clerical error by escrow typist in legal description in quitclaim deed where refusal to admit such evidence and pleadings had effect of compelling future piecemeal litigation.

◆

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Hugh B. Martin and another against Frederick Ray and another to recover damages and for a mandatory injunction directing defendants to remove from easements a tree and open ditch and dam constructed by defendants. From a judgment for plaintiffs, defendants appeal.

Reversed and remanded for new trial.

See, also, 170 P.2d 75; 173 P.2d 573.

Julius V. Patrosso, of Los Angeles, for appellants.

Chas. L. Nichols, of Los Angeles, for respondents.

KINCAID, Justice pro tem.

Defendants appeal from a judgment for plaintiffs wherein nominal damages of $10 are awarded and the court, by way of mandatory injunction, directs the defendants to forthwith remove from the easements described in the findings a certain transplanted oak tree, an open ditch and dam constructed by defendants thereon, and to restore the surface of such easements to status quo ante.

By leave of court first had, plaintiffs filed a supplemental complaint on July 26, 1943, which added a claim for damages to the requested injunction. Paragraph I of such supplemental complaint is made up almost entirely of a lengthy metes and bounds description which purports to describe the easements in question. The answer of defendants was filed, with denials of all material allegations except as to such paragraph I. As to it a separate written stipulation was executed by the parties, through their attorneys, and filed, to the effect that the failure of defendants to answer such paragraph shall not be deemed to be an admission of its allegations but that the same shall be deemed denied, each of the parties reserving the right to establish the facts which are the subject of such paragraph at the time of trial.

Two other cases (Superior Court Nos. 467137 and 487649) involving different issues were tried consecutively with this case (No. 467136) and it was stipulated that all evidence received in the three cases should be embraced and considered in each case.

The trial of the within case began on July 31, 1944, and before any evidence was received defendants' counsel asked leave of court to file an amended answer to plaintiffs' supplemental complaint and a cross-complaint, both such documents having been served upon plaintiffs' counsel six days previously. The court was then advised that the only change made by the proposed amended answer was to add a traverse to paragraph I of the supplemental complaint denying that the oak tree was located upon any easement and setting up what defendants contend are the proper legal descriptions of the easements in question which would show that the property upon which the oak tree was located was owned by defendants free of any easement rights. The proposed cross-complaint set forth a cause of action against plaintiffs, as cross-defendants, for revision and reformation of a quitclaim deed. Defendants' counsel further advised the court and offered to prove that the filing of such amended answer and cross-complaint was made necessary by the discovery, since the commencement of the other trials hereinabove mentioned, of a clerical error in the legal descriptions contained in a quitclaim deed from plaintiffs to defendant Mary Louise Ray, by reason of which a small triangular section of land upon which the oak tree in question is now located was mistakenly omitted by an escrow typist and which was intended by such parties to have been included therein; that such quitclaim deed was to have covered the whole of an easement which had theretofore been reserved by plaintiffs over a parcel of land referred to in the case as parcel C and which easement ran in a generally southwesterly direction from a point where it connected with other easements which are still reserved by plaintiffs; that plaintiffs agreed to quitclaim in full the easement so located on parcel C because of the subsequent acquisition of this parcel in fee by defendant Mary Louise Ray.

The trial judge inquired as to whether plaintiffs' counsel would stipulate that such proposed pleadings might be filed by defendants and, upon encountering a refusal by plaintiffs to do so, indicated that he would refuse leave to file them in the absence of a stipulation by plaintiffs agreeing thereto. Defendants' attorney then pointed out that they had only recently discovered the mistake, they were acting in good faith in making the request at the earliest possible moment, and plaintiffs had had ample notice by the prior service upon them of the proposed pleadings; that unless leave was granted to file them or try the new issues thus raised the resulting judgment would forever bar a reformation of the quitclaim deed, in that a mandatory injunction to remove the tree would have the legal effect of a finding that the triangle parcel upon which it is located is included within an easement reserved by plaintiffs. The trial judge then stated, in effect, that he did not wish to act differently in this case than he had in other cases like it when he depended upon stipulations; that a cross-complaint was like a new suit and that defendants could bring a separate suit at any time to seek the relief sought by their proposed cross-complaint. Plaintiffs' counsel then offered the limited stipulation that paragraph I of defendants' original answer to the supplemental complaint be deemed amended to set forth what defendants have alleged in their proposed amended answer to be the correct and inclusive legal description of the present easements, which offer was accepted by defendants.

Plaintiff Hugh B. Martin then testified on direct examination to the effect that his property had been laid out so that its maximum use was for horseback riding; that when the tract was originally subdivided the only access to that portion known as parcel B was through an easement which was reserved over parcels A and C; that plaintiffs had originally acquired title to these and adjacent properties from the subdivider, Garden Land Company, Limited, and subsequently sold the three parcels in question to defendant Mary Louise Ray. Since the latter had acquired title to this land the easement over parcel C no longer served any purpose, so the subdivider requested him to quitclaim it to her, which he did, reserving, however, particularly for horseback riding purposes, a narrow easement paralleling the east property line of C. which includes the triangular area whereon the oak tree is situate. Such plaintiff further testified that defendants had constructed a rock or masonry ditch within the confines of the easements which is about 2 feet wide and 12 to 18 inches deep, with a dam consisting of two rocks, resulting in a diversion of water upon plaintiffs' roadway; that the oak tree grows upon and completely blocks the portion of the reserved easement where it is located and, together with the ditch, makes it dangerous for any one to ride horseback over such easements.

On cross-examination of this plaintiff, defendants' counsel, by his questions, endeavored to elicit answers showing that it was the intention of the parties to include in the quitclaim deed all of the easement running between parcels A and C, including that portion whereon the tree is located, and that such plaintiff had until recently believed all of it to have been so included. Notwithstanding the fact that this witness had related in detail in his direct testimony his claim that the disputed area was still reserved to him as a part of the easement, the court, on objection of his counsel that this line of questioning was wholly incompetent under the issues framed by the pleadings, refused to permit him to answer. Defendants' attorney thereupon, pursuant to his previously made offer to prove that the failure to include the disputed triangular area within the legal description contained in the quitclaim deed was caused by the mistake of a typist employed by the bank which handled the escrow through which the sale by plaintiffs of parcels B and C to defendant Mary Louise Ray was effected, further offered the testimony of the supervisory escrow officers of such bank to show that the escrow instructions submitted by defendant Frederick Ray with reference to the quitclaim deed not only directed the inclusion therein of all the property now in such instrument described but also a further portion which was omitted and which covered the area where the tree is now located. Defendants further offered to substantiate the fact that it was plaintiffs' intention originally to include this portion in the quitclaim by the testimony of a surveyor who had previously been employed by plaintiffs to make a survey for the purpose of ascertaining the legal descriptions to be so included. To these offers plaintiffs' counsel entered an objection on the ground that the quitclaim deed was in writing and that such proffered parol evidence would tend to alter the legal description contained therein. The objection was sustained by the court.

It is thus readily apparent that, although plaintiffs made no attempt to refute or deny the facts offered to be proved by defendants, the effect of the court's rulings was to prevent them from establishing facts which, if believed by the court, would have constituted a complete defense to the action in so far as the claimed obstruction and encroachment by the oak tree is concerned. The judgment herein justifies defendants' expressed apprehension that, unless permission were granted them to file their proposed amended pleadings and introduce evidence as to the mistake which had been made in failing to include all of the intended description in the quitclaim deed, the resulting judgment of the court might have the effect of foreclosing them from further relief in that regard. That this result may have eventuated is shown by the fact that, although no mention of the quitclaim deed was made in the pleadings on file, the trial court proceeded to make a finding that plaintiffs did execute such a deed containing the description now found therein and that, by reason thereof, easements were reserved to plaintiffs including that portion upon which the tree is situate.

[1, 2] Such an adjudication went to the very heart of the issues to which defendants' proffered evidence might have proven a complete defense. They are wrongfully damaged by such a finding without having had their day in court or opportunity to be heard with reference to its subject matter. Even under the present state of the pleadings, aided by the stipulations of the attorneys, both written and oral, such proffered evidence should have been admitted. The written stipulation provided that the legal description of the claimed easements as contained in the supplemental complaint was deemed denied by defendants, with the right reserved to the parties to establish at the trial the facts as to what property should properly be included in such easements. The oral stipulation was to the effect that defendants' answer be deemed amended to set forth what the latter claim to be the correct legal description and which included the triangular parcel upon which the tree is located. The evidence offered by defendants went directly to establish the fact that the tree was located upon property owned by defendants free of any easement or other claim by plaintiffs and therefore could not be the subject of any injunction or result in any damage to them. By the complaint in this action plaintiffs have sought relief at the hands of a court of equity. "It is a familiar rule that equity once having jurisdiction of the subject matter of an action will retain it to the end that a complete adjudication of all conflicting rights may be had and a final determination of all matters in controversy may be accomplished. Litigation by piecemeal is not looked upon favorably by equity, and therefore, whenever possible equity will dispose of the entire controversy between the parties, will grant complete relief, and whenever possible, will settle and determine all differences between the parties in the one action, thereby, as between the same parties and upon the same subject matter, leaving nothing for further

litigation." Vallera v. Vallera, 1944, 64 Cal.App.2d 266, 271, 148 P.2d 694, 696. See also Sonnicksen v. Sonnicksen, 1941, 45 Cal. App.2d 46, 52, 113 P.2d 495; Tomas v. Vaughn, 1944, 63 Cal.App.2d 188, 192, 146 P.2d 499; Brunswig Drug Co. v. Springer, 1942, 55 Cal.App.2d 444, 450, 130 P.2d 758; Santa Monica Ice, etc., Co. v. Rossier, 1941, 42 Cal.App.2d 467, 471, 109 P.2d 382; Swan v. Talbot, 1907, 152 Cal. 142, 147, 94 P. 238, 17 L.R.A.,N.S., 1066. The course directed by the rulings of the trial judge in refusing to admit such relevant and pertinent evidence and permission to file the amended and supplemental pleadings has the effect of compelling future piecemeal litigation. This result would have been avoided by contrary rulings, thus determining all differences between the parties in the one action. Before a new trial of the case is had, leave should be granted the defendants to file suitable amended supplemental pleadings in order that this entire controversy between the parties may be adjudicated. See 21 Cal.Jur. 181 to 184, pars. 126, 127.

The judgment is reversed and the cause remanded for a new trial.

DESMOND, P. J., and WOOD, J., concur.

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76 Cal.App.2d 471

MARTIN et al. v. RAY et al.

Civ. 15095.

District Court of Appeal, Second District, Division 3, California.

Oct. 14, 1946.

1. Covenants 🔑73, 79(1)

If building restrictions in deed are covenants they can be given force as between parties only by showing them to be of a character whereby burden imposed by them was one upon land conveyed and incident to its ownership so that when defendants acquired property it was taken subject to such burden, and benefit of covenants was incident of ownership of other parcels in tract so that when original subdivider parted with them benefit of covenants passed with them as incident of their ownership and subdivider's grantees were entitled to such benefit as present owners of such property.

2. Covenants 🔑79(1)

In order that covenants in deed have force even as between grantees and ultimate transferees, it must appear that insertion of covenants in deed by original subdivider was in effect the creation of what amounts to a servitude, to burden of which land conveyed was subjected as the servient tenement and to benefit of which remainder of the tract was entitled as dominant tenement.

3. Deeds 🔑173

Where grantor sold portion of tract with restrictions, but without indicating that portion was part of larger tract, balance of which grantor retained, or that restrictions were intended for benefit of other lands, and without designation of land which was to be the dominant tenement as to equitable servitude created by restrictions, and in case of breach of restrictions land was to revert to grantor, his heirs or assigns, restrictions did not run to grantees or other owners of property in tract.

4. Covenants 🔑79(1)

That ultimate transferees of land at time of taking title knew of restrictions originally imposed upon the land by original owner and that similar restrictions were likewise included in deeds to adjacent properties did not charge ultimate transferees with knowledge that owner intended to adopt a general restriction plan so as to preclude them from performing acts in violation of such plan, where owner's deeds did not refer to a common plan of restrictions.

5. Easements 🔑3(1)

A servitude cannot exist in gross, but must be appurtenant to other benefited property.

6. Easements 🔑13

Before a covenant may be enforced as equitable servitude or easement, the deed or other instrument by which it is created must describe with particularity the dominant tenement which is to be benefited by restriction placed upon property of grantee.

7. Deeds ⚷156

Grantees could enforce against their transferees conditions which grantees included in their deed to land provided grantees could establish that transferees committed a breach of such conditions notwithstanding conditions imposed in deeds from grantor to grantees ran only in favor of grantor and its assigns.

◆

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Hugh B. Martin and another against Frederick Ray and others to recover damages for violation of building restrictions and to require defendants to remove certain property. From an adverse judgment, Frederick Ray and Mary Louise Ray appeal.

Reversed.

See, also, 173 P.2d 570.

Julius V. Patrosso, of Los Angeles, for appellants.

Chas. L. Nichols, of Los Angeles, for respondents.

KINCAID, Justice pro tem.

Defendants Frederick and Mary Louise Ray appeal from a judgment in favor of plaintiffs in the sum of $1,000 and requiring them to remove from certain property owned by them, designated as parcels A and C, a building or structure placed on each of said parcels as being violative of certain building restrictions. Judgment was also awarded in favor of plaintiffs and against the defendant Garden Land Company, Limited, a corporation, hereinafter for purposes of brevity referred to as Garden, in the sum of $10, from which no appeal has been taken.

The evidence reveals that Garden was the original subdivider of the tract and that plaintiffs purchased some property therein from it in 1936, of which the involved parcels of land were a part. In July, 1936, they sold and conveyed to a Mrs. Moore a portion of the property so purchased, which is referred to in this case as parcel A. In December, 1937, Mrs. Moore sold and conveyed this parcel to defendant Mary Louise Ray. In the same month, plaintiffs sold and conveyed to such defendant two additional portions of the property purchased by them from Garden, which are denominated herein parcels B and C. Garden originally imposed certain building restriction conditions in its deeds to plaintiffs, as well as to owners of adjacent properties. The subsequent conveyances, however, have created a different situation as between parcels A and C, so far as the binding effect of such conditions on the grantees thereof may be concerned.

The original deed by Garden to plaintiffs covering A, made such conveyance subject to a list of enumerated conditions, followed by a proviso that any breach thereof shall cause said premises to revert to Garden, its successors or assigns. The two subsequent conveyances of this property from plaintiffs to Mrs. Moore and from the latter to defendant Mary Louise Ray were silent as to any conditions whatsoever save that they were made subject to those of record. Parcel C came to plaintiffs by way of original deed from Garden with the same conditions imposed as were applied by it to A. Title to C remained in plaintiffs until they conveyed this property to defendant Mary Louise Ray. By this latter deed plaintiffs, in addition to providing that the conveyance was taken subject to conditions of record, added the further proviso that it was made and accepted subject to all of the subsequently enumerated conditions, whereupon plaintiffs set forth in detail all the building restriction conditions contained in the original deed from Garden to plaintiffs. Plaintiffs then inserted a further provision that any breach thereof shall cause said premises to revert to plaintiffs, their successors or assigns.

Concerning Parcel A.

As to A, the trial court found that the defendants have constructed a so-called Gate House which has, in some particulars, been violative of the restrictive conditions contained in the deeds from Garden to plaintiffs, from plaintiffs to Moore, and from the latter to Mary Louise Ray. The court, by amendment to its findings of fact, further found that defendants knew of the restrictive conditions originally imposed by Garden as to each of such parcels, as well as to other adjacent property, by deeds embracing what amounts to a general uniform subdivision and restriction plan and that because of such knowledge it would be inequitable to permit a violation thereof as to A, as well as to C. Defendants challenge the right of plaintiffs to enforce, as to Parcel A, the conditions or building restrictions contained in the deed thereto from Garden to plaintiffs, or in the successive deeds, upon either theory as recited in the findings.

[1, 2] To sustain the court's finding that the claimed violations are enforcible by plaintiffs through such deeds, it is necessary for plaintiffs to establish the fact that the restrictions are cast in the form of covenants, the breach of which may cause a reversion and are not in fact mere conditions. If they may be deemed to be covenants they can be given force as between the parties hereto only by showing them to be of a character whereby (a) the burden imposed by them was one upon the land conveyed and incident to its ownership, so that when defendants acquired this property it was taken subject to such burden; and (b) the benefit of the covenants was an incident of the ownership of the other lots or parcels in the tract, so that when the original subdivider Garden parted with them, the benefit of the covenants passed with them as an incident of their ownership and the plaintiffs are now entitled to such benefit as the present owners of such property. In order that such covenants have force, not merely as between the original parties, but as between plaintiffs and defendants, it must appear that their insertion in the deed by Garden was, in effect, the creation of what amounts to a servitude, to the burden of which Parcel A was subjected as the servient tenement, and to the benefit of which the remainder of the tract was entitled as the dominant tenement. Werner v. Graham, 1919, 181 Cal. 174, 180, 183 P. 945.

[3] The circumstances surrounding the original grant of title to Parcel A by Garden to plaintiffs, followed by subsequent grants by virtue of which defendant Mary Louise Ray took title, are very similar to those existing in the case just cited, and from which we hereafter quote (181 Cal. at page 181, 183 P. at page 948). Garden, as the owner of the tract, sold part of it to plaintiffs, exacting of them restrictive provisions as to its use, "but without a word indicating that the land conveyed is part of a larger tract, the balance of which the grantor still retains, or that the restrictions are intended for the benefit of other lands, or that their benefit is to inure to or pass with other lands, and without any description or designation of what is an essential element of any such servitude as is claimed, namely, the land which is to be the dominant tenement. Servitudes running with the land in favor of one parcel and against another cannot be created in any such uncertain and indefinite fashion. It is true the nature of the restrictions is such that, when considered in connection with the fact that Marshall still retained the greater portion of the tract, it is not improbable that he exacted them for the benefit of the portion so retained. But the grantee's intent in this respect is necessary, as well as the grantor's and the deed, which constitutes the final and exclusive memorial of their joint intent, has not a word to that effect, nor anything whatever which can be seized upon and given construction as an expression of such intent. If such was their intent, it has not been expressed. Omitting, as we must, any consideration of what the understanding was between Marshall and his grantees, except as shown by the instruments between them, and construing the deed in the light of the fact that Marshall was at the time the owner of a large number of other lots in the tract, it may yet well be that the grantee intended to obligate himself only to Marshall, his heirs and assigns. Certainly that is all that is said. It is also difficult to see how there can be any valid creation of what is practically a servitude, without some designation or description of what is an essential factor, namely, the dominant tenement. [Citing cases.] The fact, also,

that the only expression in the deed as to who may act in case of a breach of the restrictions is that in such case the land shall revert to Marshall, his heirs or assigns, is strongly indicative of the fact that it was intended that Marshall, his heirs or assigns, should alone have the right to act. [Citing cases.] It is not possible, in view of these considerations and the rule of strict construction very properly applicable, reasonably to construe the restrictions as covenants which run, not to Marshall, his heirs or assigns, but to Marshall as the owner of certain land, not designated or described, and to his various successors in interest in such land. This view is amply supported by authority. [Citing cases.]"

That the restrictions herein imposed by the deeds as to parcel A must be construed as running only to Garden or its assigns, and not to plaintiffs or other owners of property in the tract, is further shown by the case of Wing v. Forest Lawn Cemetery Ass'n, 1940, 15 Cal.2d 472, 479, 101 P.2d 1099, 130 A.L.R. 120. In discussing the law applicable to a factual situation such as is here presented, the court said (15 Cal. 2d at page 479, 101 P.2d at page 1103): "The law is well settled in California, that the deed is the final and exclusive memorial of the intention and rights of the parties. [Citing cases.] Furthermore, any provisions of an instrument creating or claimed to create such a servitude will be strictly construed, any doubt being resolved in favor of the free use of the land. [Citing cases.]" As was said in Moe v. Gier, 1931, 116 Cal.App. 403, 409, 2 P.2d 852, 854: "The language in the deeds involved herein did not create equitable servitudes. To create an equitable servitude in the grant of lands in a large area, it is essential that there must be a general scheme of restrictions sufficiently uniform in character to indicate unmistakably a designated and adopted plan throughout common to all purchasers of lots. The restrictions must not only appear in one deed, but in all the deeds, and must expressly declare that such restrictions are for the benefit of and run with all other lots in the designated area. In other words, the restrictions must be for the mutual benefit of all parcel owners and each lot imposed with a servitude for the benefit of each and every other lot. It is necessary to state in the deed what is the servient and what is the dominant tenement. See Berryman v. Hotel Savoy Co., 160 Cal. 559, 117 P. 677, 37 L.R.A.,N.S., 5; Werner v. Graham, 181 Cal. 174, 183 P. 945; McBride v. Freeman, 191 Cal. 152, 215 P. 678. The intent of the parties to create mutual and reciprocal rights of restrictions between the grantees of the original grantor must appear in the deed. Gamble v. Fierman, 82 Cal.App. 180, at page 182, 255 P. 269."

[4] Plaintiffs urge the sufficiency and soundness of the second theory as expressed by the court's findings to the effect that because defendants, at the time of taking title to parcel A from Moore, knew of the restrictive conditions originally imposed upon it by Garden, and that similar restrictions were likewise included in the deeds to adjacent properties, they thereby were charged with knowledge that it was the intention of such subdivider to adopt a general uniform subdivision restriction plan, and that because of such knowledge equity would not permit them to do or perform any acts in violation of such plan. A like claim was urged in Werner v. Graham, supra, 181 Cal. 174, 183 P. 945, and in disposing of it contrary to such finding of the court in our instant case the Supreme Court there pointed out (181 Cal. at page 183, 183 P. 945) that the original subdivider exacted similar restrictions in all his deeds and clearly had in mind a uniform plan of restrictions which he intended to, and actually did, impose upon all the lots in the tract as he sold them. He failed, however, as did Garden in its original deeds to parcel A and adjacent properties, to include any language in the deeds which refers to a common plan of restrictions or which expresses or in any way indicates any agreement between the grantor and grantee that the lot is taken subject to any such plan. These deeds are naturally different from those which include such language and which thereby create mutual equitable servitudes in favor of each parcel as against all the others, the burden and benefit thereof passing to the new owner with each succeeding convey-

ance as an incident of the ownership of the parcel. The distinction between this class of deed and that wherein no language appears indicating any intent to create such reciprocal rights is clearly demonstrated by the words of the court appearing on pages 184 and 185 of 181 Cal., on page 949 of 183 P., as follows: "The intent of the common grantor—the original owner—is clear enough. He had a general plan of restrictions in mind. But it is not his intent that governs. It is the joint intent of himself and his grantees, and as between him and each of his grantees the instrument or instruments between them, in this case, the deed—constitute the final and exclusive memorial of such intent. It is also apparent that each deed must be construed as of the time it is given. It cannot be construed as of a later date, and, in particular, its construction and effect cannot be varied because of deeds which the grantor may subsequently give to other parties. Yet that is exactly what is done in the decisions holding that mutual servitudes exist in cases where all the deeds taken together, evidence a common plan of restrictions, although no single deed by itself evidences anything more than an intent to put particular restrictions on a particular lot. As a concrete instance, take the first deed given by Marshall. At that time there was nothing to evidence any general plan of restrictions, and if the question as to the effect of the deed had arisen then, it must necessarily have been construed as if no such general plan existed. If it must have been so construed at that time, it must be so construed now. Whatever rights were created by the deed were created and vested then, and the fact that it later appears that Marshall was pursuing a general plan common to all the lots in the tract cannot vary those rights. The same is true of each deed as it was given. Nor does it make any difference that, as claimed by the defendants, Marshall gave each grantee to understand, and each grantee did understand, that the restrictions were exacted as a part of a general scheme. Such understanding was not incorporated in the deeds, and, as we have said, the deeds in this case constitute the final and exclusive memorials of the understandings between the parties. Any understanding not incorporated in them is wholly immaterial in the absence of a reformation. [Citing cases.] This whole discussion may in fact be summed up in the simple statement that, if the parties desire to create mutual rights in real property of the character of those claimed here, they must say so, and must say it in the only place where it can be given legal effect, namely, in the written instruments exchanged between them, which constitute the final expression of their understanding."

Plaintiffs strongly rely upon the case of Martin v. Holm, 1925, 197 Cal. 733, 242 P. 718, in support of their contention that, through the interposition of equity, they are empowered to enforce these restrictions as against defendants. That case is factually readily distinguishable from the instant case, as is shown by the reference to it in Wing v. Forest Lawn Cemetery Ass'n, supra, 15 Cal.2d 472, at page 483, 101 P.2d 1099, at page 1105, 130 A.L.R. 120, wherein the court said:

"in that case this court held that the deeds and agreements in question expressly contained a covenant on the part of the grantors to subdivide, restricting the entire tract; that the original grantors had in mind a general plan of building restrictions intended for the benefit of all the lots, including their own, that the conveyances which followed each imposed the same or similar restrictions; and that grantees of three lots who took a deed which omitted these restrictions took the same with notice and were bound thereby.

"Since, in this case, there is no designation of a dominant tenement and no expression of any general plan of which plaintiff's conveyance is a part, there is no basis for holding that her deed contained a valid equitable easement in the lands retained by or subsequently to have been conveyed by her grantor."

[5, 6] Plaintiffs further contend that the doctrine of equitable servitudes should be invoked, although they benefit or restrict only a single parcel of land, without the necessity of showing that any general plan of uniform building restrictions has been imposed. That under certain appropriate conditions this may be the rule is pointed

out in Marra v. Aetna Construction Co., 1940, 15 Cal.2d 375, 378, 101 P.2d 490, but, as is there indicated, a servitude cannot exist in gross, but must be appurtenant to other benefited property. Berryman v. Hotel Savoy Co., 1911, 160 Cal. 559, 117 P. 677, 37 L.R.A.,N.S., 5. The lot in question in the Marra case differed from parcel A herein, in that the deed originally conveying title to it contained an express recitation that the restrictive covenant therein contained was made for the benefit of the adjacent lot, the owner of which was seeking to invoke such equitable principle. Under these circumstances, such a covenant is enforcible as an equitable servitude by the owner of the property declared to be benefited thereby against a grantee of the property so charged. But no statement appears in the deed by which parcel A was originally conveyed to plaintiffs whereby the restrictive conditions there contained were imposed for the benefit of any property whatsoever. As is pointed out in Werner v. Graham, supra, 181 Cal. 174, at page 180, 183 P. 945, at page 947, such restrictive conditions were "manifestly not for the benefit to the estate conveyed, but to its detriment." It now seems well established in this state that, before a covenant may give rise to or be enforced as an equitable servitude or easement, the deed or other instrument by which it is created must describe with particularity the dominant tenement which is to be benefited by the restriction placed upon the property of the grantee. Berryman v. Hotel Savoy Co., supra, 160 Cal. 559, 563, 117 P. 677, 37 L.R.A.,N.S., 5; Werner v. Graham, supra, 181 Cal. 174, 180, 183 P. 945; Wing v. Forest Lawn Cemetery Ass'n, supra, 15 Cal.2d 472, 480, 101 P.2d 1099, 130 A.L.R. 120.

Concerning Parcel C.

As to parcel C the trial court found that the defendants have constructed thereon a building or structure violative of the imposed restrictions, in that they have moved a substantial portion thereof upon said parcel and have utilized used materials in its construction, that plans of such structure were not previously or at all submitted to Garden for its approval, the structure contained less than 2000 square feet and was occupied for residential purposes by employees of defendants. As a matter of fact the evidence discloses that the building or structure so dignified by this extensive finding is but a small temporary tent house made of canvas and erected over a wooden floor laid on a few piled brick. It was used on some occasions as sleeping quarters by an employee of defendants while he was engaged in landscaping their extensive premises. Prior to the trial the tent portion was removed, leaving only the flooring.

[7] In so far as the court may have attempted, by its findings and judgment, to support the right of plaintiffs to enforce these claimed violations of the conditions contained in the deeds from Garden to plaintiffs covering either parcel A or C, it has erred. As is shown above the reversion clause in such deeds runs in favor of Garden and its assigns only. However, plaintiffs have an undoubted right to enforce against defendants the conditions which they included in their deed to parcel C, provided they are able to establish by competent evidence that the defendants committed a breach of such conditions. Defendants argue the insufficiency of the evidence as a matter of law to show any violations thereof. A study of the record discloses that the erection and maintenance of the tent house on C is of much less concern or import to the plaintiffs than is the gate house on parcel A. In their claim for damages the alleged violations of the conditions applying to C play little part. In awarding damages as against these defendants in the sum of $1,000 the trial court made no allocation as to what portion thereof was being given for the erroneously included gate house and what portion for the tent house. The two were lumped into one general damage allowance. As a new trial is necessary in any event because of the elimination of the first factor as a basis of damage there seems to be no particular point in here pursuing the question of the sufficiency of evidence as to issues which may be altogether different at that time.

The judgment is reversed.

DESMOND, P. J., and WOOD, J., concur.

29 Cal.2d 144

LOHMAN v. LOHMAN et al.

L. A. 19299.

Supreme Court of California, in Bank.

Oct. 18, 1946.

1. Executors and administrators ⚷202(1), 242

Under statute providing that judgment may be enforced or carried into execution after lapse of five years, court may grant a judgment creditor leave to enforce his judgment by presenting a claim against debtor's estate and by bringing an action thereon if the claim is rejected. Code Civ.Proc. § 685.

2. Execution ⚷73

An order under statute providing that judgment may be enforced or carried into execution after lapse of five years, may only be made if, during the five years, following entry of judgment, execution creditor exercised due diligence in locating and levying on property owned by debtor or in following available information to point where a reasonable person would conclude that there was no property subject to levy within that time. Code Civ. Proc. § 685.

3. Execution ⚷73

Under statute providing that judgment may be enforced or carried into execution after lapse of five years, court may deny its process, though it is satisfied as to creditor's diligence, if debtor shows circumstances occurring subsequent to five year period on which, in exercise of sound discretion, it should conclude that creditor is not now entitled to collect his judgment. Code Civ.Proc. § 685.

4. Evidence ⚷265(4)

Evidence concerning alleged conversations had by divorced wife with her former husband before his death, in reference to payment of alimony judgment, was the weakest and most unsatisfactory of all kinds of evidence.

5. Affidavits ⚷18
Evidence ⚷594

A trial judge is not required to accept as true the sworn testimony of a witness, even in absence of evidence directly contradicting it, and such rule applies to an affidavit.

6. Executors and administrators ⚷228(1)

Where divorced wife who sought to enforce alimony judgment against estate of former husband after his death under statute providing that judgment may be enforced or carried into execution after lapse of five years, relied on former husband's good intentions and failed to enforce payment of sums to her by legal action when she had a lien on stock having much greater value than alimony judgment, she could not prevail under the statute since she did not exercise the required diligence. Code Civ.Proc. § 685.

7. Execution ⚷73

Under statute providing that a party in whose favor judgment is given may, at any time within five years after entry thereof, have a writ of execution issued for its enforcement, a creditor is entitled, as a matter of right, to execution on such a judgment for all amounts that have accrued within five years after date of application therefor. Code Civ.Proc. § 681.

8. Execution ⚷73

Though issuance of execution on a judgment requiring monthly payments may be denied on equitable grounds, proof that installments have accrued within five years establishes a prima facie right to execution, and burden is cast on judgment debtor to establish facts justifying an order denying the writ. Code Civ.Proc. § 681.

9. Executors and administrators ⚷114

If former husband's letter to divorced wife was sufficient to estop his executrix from pleading as a bar to enforcement of alimony judgment against his estate, the statute providing that a party in whose favor judgment is given may at any time within five years after entry thereof have a writ of execution issued for its enforcement, such estoppel only operated to start the time running again from date of acknowledgment of the debt, and therefore divorced wife's unqualified right to execution expired five years after date of letter. Code Civ.Proc. § 681.

10. Execution 🔑73

Executrix' failure to object to hearing of motion for issuance of execution to enforce a judgment for alimony against deceased's estate constituted an implied waiver of any defect in notice of motion with respect to statement of grounds on which motion was to be made. Code Civ. Proc. § 681.

11. Execution 🔑73

Trial court's denial of motion for issuance of execution to enforce a judgment for alimony against a decedent's estate was not properly based on statute limiting the testimony of a party to an action or proceeding brought against an executor, where there was no showing that judgment creditor was required to rely on her own testimony to prove her claim against the estate. Code Civ.Proc. § 1880, subd. 3.

12. Witnesses 🔑181

The statute limiting the testimony of a party to an action or proceeding brought against an executor may be waived by an executor or executrix. Code Civ. Proc. § 1880, subd. 3.

13. Witnesses 🔑128

A motion authorized by statute providing that judgment may be enforced or carried into execution after the lapse of five years, is not a "proceeding" within meaning of statute limiting the testimony of a party to an action or "proceeding" brought against an executor. Code Civ. Proc. §§ 685, 1880, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Proceeding".

CARTER and SHENK, JJ., dissenting in part.

SPENCE and SCHAUER, JJ., dissenting.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Suit for divorce by Jennie A. Lohman against Theodore G. Lohman, wherein the plaintiff obtained a judgment for alimony. From an order of the superior court of Los Angeles county, Ingall W. Bull, judge, denying issuance of execution to enforce the judgment for alimony against the defendant's estate, opposed by Zalla Lohman as executrix of the estate of the defendant, the plaintiff appeals.

Order reversed with directions.

Prior opinion, see 159 P.2d 47.

Freston & Files, H. R. Kelly, Sydney Wetzler and Bion B. Vogel, all of Los Angeles, Cal., for appellant.

McLaughlin & McGinley and Howard D. Hanson, all of Los Angeles, Cal., for respondent.

EDMONDS, Justice.

At the time of the death of Theodore G. Lohman, he had not paid the amounts specified in a property settlement agreement whose provisions were approved by the court and included in both the interlocutory and the final decree of divorce obtained by Jennie A. Lohman. His second wife, Zalla Lohman, as the executrix of his estate, successfully resisted a motion to enforce the decree, and the appeal is from the order denying relief.

The interlocutory decree of divorce was entered April 16, 1929. In accordance with the agreement of the parties, it required the immediate payment of $5,500 and an additional $10,000 in annual installments of $2,000 in 1930, $2,000 in 1931, and $6,000 in 1932. The court also awarded Jennie A. Lohman alimony at the rate of $150 per month. According to her affidavit in support of the motion, in 1932 Lohman wrote to her as follows:

"The reason I am writing this to you is that you can use this letter in the event I do not meet my obligation. I will go on record and say you have *bin* very *considered* and used good Judg*e*ment in not forc*e*ing payment on the last Note. it would only have *ment* one result ~~thing~~ at the present time we are doing the best we can hop*e*ing a change will come soon*e*
ore
at one time we *i*mployed sixty ~~ar~~e more with a fair ~~f~~ profit and now only twenty on one half time we have cut wages from top to bottom 20%. to keep the overhead down we took a heav*e*y *lose* in 1931 and from all indication it will repeat in 1932, I

am not telling you this as a hard luck storey it is simply telling you facts as the are, I have *bin* very weak in some things but I can assure you I will play square with you in a *fiancely* way, if you give me a chance."

The "indulgence" which Lohman requested in this letter was accorded to him, the affiant stated, because she did not desire to harass her former husband, but thereafter from time to time she requested him to pay the amounts due to her. In response to these requests, she was assured by Lohman that "she would get her money" and he asked for further time to make the payments. Legal proceedings were not commenced because of her confidence that her former husband would respect his obligation.

Lohman died in 1944, the affidavit continued, without making any provision for the payment of the amounts due under the provisions of the decree, although he left a sizeable estate, including a large wholesale plumbing establishment with adequate funds to pay his debts. He had not paid the $2,000 due in 1931 nor the $6,000 payable the following year and since February, 1935, had paid only $125 a month on account of alimony. Concerning the monthly payments, Lohman had advised her that he could afford to pay only $125 and whenever she remonstrated about the amount, he told her that it would be made up later. Since the divorce she has been in poor health and not in a position to enter into any acrimonious controversy with her former husband. Ultimately, she assumed, her husband would meet his obligation.

The only facts stated by the executrix in an affidavit filed in opposition to the motion are that at all times since the entry of the interlocutory decree, Lohman resided in the city of Los Angeles; Jennie A. Lohman knew of his address and whereabouts during all of that time, and also knew that he was engaged in business in the county of Los Angeles and was solvent.

The appellant contends that in denying the motion, the trial judge abused his discretion because her course of conduct under the circumstances was within well sanctioned and approved principles. In any event, she asserts, the right to a writ of execution for alimony due within five years prior to the date of Lohman's death is not subject to judicial discretion. The position of the executrix is that the affidavit of Jennie A. Lohman does not show that she used due diligence to collect the amounts awarded to her by the terms of the decree in her favor. Other points urged in support of the ruling are that section 1880(3) of the Code of Civil Procedure applies to a proceeding for the issuance of an execution, that the appellant is precluded from giving evidence upon any claims or demand against the estate; that the notice of motion is fatally defective in that it failed to state the ground upon which the motion was to be made; and that the trial court did not abuse its discretion in ruling adversely to the appellant.

[1-3] Section 685 of the Code of Civil Procedure provides: "In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion." Under this statute the court may grant a judgment creditor leave to enforce his judgment by presenting a claim against the debtor's estate, and by bringing an action thereon if the claim is rejected. Saunders v. Simms, 183 Cal. 167, 190 P. 806; Bank of America N. T. & S. A. v. Katz, 45 Cal.App.2d 138, 113 P.2d 759; Pacific Gas & Elec. Co. v. Elks Duck Club, 39 Cal.App.2d 562, 103 P.2d 1030. But such an order is subject to the same rules applicable to one which authorizes the issuance of execution more than five years after judgment was entered. It may only be made if, during the five years following entry of judgment, the execution creditor exercised due diligence in locating and levying upon property

owned by the debtor, or in following available information to the point where a reasonable person would conclude that there was no property subject to levy within that time. And even if the court is satisfied as to the diligence of the creditor in this respect, it may deny its process if the debtor shows circumstances occurring subsequent to the 5-year period upon which, in the exercise of a sound discretion, it should conclude that the creditor is not now entitled to collect his judgment. Butcher v. Brouwer, 21 Cal.2d 354, 132 P.2d 205; Beccuti v. Colombo Baking Co., 21 Cal.2d 360, 132 P.2d 207; Hatch v. Calkins, 21 Cal.2d 364, 132 P.2d 210.

[4, 5] Upon the issue of due diligence, the appellant relies upon certain conversations which she claims to have had with her former husband and other matters assertedly occurring before his death. Assuming that section 1880(3) of the Code of Civil Procedure, which limits the testimony of a party to an action or proceeding brought against an executor, does not make those statements in her affidavit inadmissible, they constitute the weakest and most unsatisfactory of all kinds of evidence. Estate of Emerson, 175 Cal. 724, 167 P. 149; Corison v. Williams, 58 Cal. App. 282, 208 P. 331. As against that affidavit, the counter-showing of the executrix cast doubt upon practically every material fact asserted by the appellant, and her claims in regard to the installment due in 1932 are directly at variance with the letter written by Mr. Lohman upon which she relies. Moreover, a trial judge is not required to accept as true the sworn testimony of a witness, even in the absence of evidence directly contradicting it, and this rule applies to an affidavit. Berg v. Journeymen Plumbers etc. Union, 5 Cal.App.2d 582, 42 P.2d 1091.

[6] By the property settlement agreement, the appellant was given a lien upon stock having a value of $20,000. She does not claim that she was ignorant of the value of the property owned by Lohman or of his ability to make payments to her. At all times, it may be fairly inferred from her affidavit and the counteraffidavit of Zalla Lohman, she knew that payments of the sums due to her might be enforced by legal action. That course was not taken, she said, because of her confidence in her former husband and her desire not to harass him. But if she chose, for more than five years, to rely upon his good intentions, as he expressed them to her, she cannot now say that she used the diligence which the law requires of her in the protection of her legal rights.

[7] But the right to enforce the payment of amounts due not more than five years before the date upon which the motion was made rests upon different principles. Section 681 of the Code of Civil Procedure provides: "The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement." In 1863, before the enactment of this section, it was held that the statute of limitations runs upon a judgment payable in installments from the date each installment becomes due. DeUprey v. DeUprey, 23 Cal. 352. This principle was later applied in construing the code section, and it was held that the creditor is entitled, as a matter of right, to execution upon such a judgment for all amounts which have accrued within five years from the date of the application therefor. Gaston v. Gaston, 114 Cal. 542, 46 P. 609, 55 Am.St.Rep. 86. These decisions were followed in Cochrane v. Cochrane, 57 Cal. App.2d 937, 135 P.2d 714, and the statement in Shields v. Superior Court, 138 Cal. App. 151, 31 P.2d 1045, to the effect that execution may not issue as a matter of right upon installments accruing within five years is disapproved.

[8] Although issuance of execution upon a judgment requiring monthly payments may be denied upon equitable grounds, proof that the installments have accrued within five years establishes a prima facie right to execution and the burden is cast upon the judgment debtor to establish facts justifying an order denying the writ. Cochrane v. Cochrane, supra. In the present case, the executrix did not deny the allegations of Jennie A. Lohman as to the amount of indebtedness upon the judgment, nor was there any suggestion of a

change of circumstances after the date of the final decree which would make it inequitable for alimony to be exacted. The entire opposition to the motion was based upon the delay in enforcing the provisions of the judgment notwithstanding the creditor's knowledge that her former husband "was engaged in business in the County of Los Angeles and was solvent."

The affidavits, therefore, do not directly present an issue as to whether Lohman, at the time of his death, had paid all amounts required by the judgment against him. The executrix does not take the position that the trial judge might have found from the evidence that there is nothing now unpaid. On the contrary, she impliedly admits that all, or a substantial part, of the amount claimed by Jennie A. Lohman has not been paid. The defense is that the divorced wife did not act diligently to collect the amount awarded to her; also, that there is no one other than herself who now can prove the amount of her claim. "It may be," says the executrix in her brief, "that appellant's affidavit is correct in all details, but there is no one other than appellant who knows this, and the point is that she lost her right to give evidence on the matter by delaying until after the decedent's death."

[9] The effect of the letter written by Lohman should also be considered in connection with the rights of the judgment creditor under the provisions of section 681 of the Code of Civil Procedure. If it be assumed that the statute, in effect, is one of limitation, and the letter, which was written in 1932, is sufficient to estop his executor from pleading its bar, such an estoppel only operates to start the time running again from the date of his acknowledgment of the debt. Under that theory the unqualified right to execution expired in April, 1937, and as there is no evidence that Lohman later acknowledged the obligation, the appellant may, therefore, have execution for amounts accruing before 1939 only by complying with the requirements of section 685 of the Code of Civil Procedure.

[10] As to the point that the notice of motion is fatally defective in that it failed to state any grounds upon which the motion was to be made, the statutory requirement in that regard is for the benefit of the opposing party. Being for his benefit he may, of course, waive its provisions. By failing to object to the hearing of the motion at the time it was noticed to be heard, the executrix impliedly waived any defect in the notice in this regard. Hecq v. Conner, 203 Cal. 504, 265 P. 180; Mallory v. See, 129 Cal. 356, 61 P. 1123; Barron v. Deleval, 58 Cal. 95; Bonfield v. Bonfield, 71 Cal.App. 705, 236 P. 162. Furthermore, the affidavit in support of the motion set forth certain facts upon which the motion was based, and sufficiently apprised the executrix of the grounds upon which the appellant relied for relief. Hecq v. Conner, supra; Savage v. Smith, 170 Cal. 472, 150 P. 353; Reher v. Reed, 166 Cal. 525, 137 P. 263, Ann.Cas.1915C, 737; Fink & Schindler Co. v. Gavros, 72 Cal. App. 688, 237 P. 1083.

[11-13] The contention of the executrix that the trial court properly denied the motion because, under section 1880(3) of the Code of Civil Procedure the appellant cannot give testimony against the estate, is also without merit. The difficulty of proof does not bar the right to maintain a legal proceeding and a court may not rest a decision upon an assumption concerning the nature of the evidence which will be proffered upon a hearing. The record does not show that the appellant must rely upon her own testimony to prove her claim and the provisions of section 1880 may be waived by an executrix. Deacon v. Bryans, 212 Cal. 87, 298 P. 30; McClenahan v. Keyes, 188 Cal. 574, 206 P. 454; Kinley v. Largent, 187 Cal 71, 200 P. 937; Cahill v. Goecke, 10 Cal. App.2d 279, 51 P.2d 905. And the motion authorized by section 685 of the Code of Civil Procedure is not a proceeding within the meaning of section 1880(3) of the same code. Tolle v. Doak, 12 Cal.App. 2d 195, 55 P.2d 542.

The order is reversed with directions to the trial court to enter an order authorizing Jennie A. Lohman to present a claim against the estate of Theodore G. Lohman for all amounts which accrued under the provisions of the decree in Lohman v. Lohman within five years prior to September 8, 1944, and to bring an action upon such claim in the event of its rejection.

GIBSON, C. J., and TRAYNOR, J., concur.

CARTER, Justice (concurring and dissenting).

I concur in the judgment of reversal and in that portion of the opinion of Mr. Justice EDMONDS which directs the entry of an order authorizing the presentation of a claim against the estate of the deceased for the installments of alimony accruing within five years prior to the application of appellant to enforce the judgment in her favor, but I dissent from that portion of the opinion which purports to approve the order of the trial court denying leave to appellant to enforce the payments provided for in the decree which ascrued prior to that time.

Mr. Justice EDMONDS predicates the portion of his opinion, with which I disagree, on the assumption that there is a conflict in the evidence with reference to the diligence exercised by appellant, the judgment creditor, and that the most that can be said is, that even if the letter written by Lohman in 1932 was an acknowledgment, it was barred by the statute of limitation before the present action was commenced.

Section 685 of the Code of Civil Procedure quoted by Mr. Justice EDMONDS requires nothing more than that the judgment creditor set forth by affidavit his "reasons" for failure to execute the judgment before it is barred by the statute of limitation. The judgment creditor must make a showing of diligence in endeavoring to collect the judgment within five years of its entry in order to obtain leave of court for the issuance of a writ of execution thereafter, and the determination of that issue rests largely in the discretion of the trial court. Butcher v. Brouwer, 21 Cal.2d 354, 132 P.2d 205; Hatch v. Calkins, 21 Cal.2d 364, 132 P.2d 210. But whether or not diligence has been exercised depends upon the *circumstances*. It is not always necessary to show that an unsuccessful endeavor was made *to collect the judgment by execution, search for property and the like* within the five-year period. See Shields v. Shields, 55 Cal.App.2d 579, 130 P.2d 982; Passow v. Bell, 27 Cal.App.2d 360, 81 P.2d 224; Corcoran v. Duffy, 18 Cal.App.2d 658, 64 P.2d 735; Atkinson v. Atkinson, 35 Cal.App.2d 705, 96 P.2d 824.

In the instant case the circumstances presented by appellant stand uncontradicted by the executrix of decedent's estate. They are sufficient to show that appellant was diligent. The circumstances in the instant case were adequate justification for appellant's failure to attempt to collect the payments accruing under the judgment within five years after they became due, as it is undisputed that this failure was due to her reliance upon the statements and conduct of decedent set forth in her affidavit herein. Hence, under the circumstances she has shown the diligence required by section 685 of the Code of Civil Procedure. The facts relative to the conduct of her former husband which lulled appellant into a false sense of security and prevented her from having execution issued within the period of five years, stand uncontradicted. The letter written by decedent in 1932 contains representations that decedent would pay if unmolested by appellant. In her affidavit appellant stated she accorded "indulgence" to decedent and was constantly "assured" that she "would get her money." Appellant had "confidence" that her "former husband" would respect his obligation and "reposed" confidence in him. In Corcoran v. Duffy, supra, the court affirmed the trial court, but the rule was clearly stated that conduct such as is present in the instant case excuses lack of attempts to collect the judgment, or that in the light of that circumstance, diligence is shown. The court said, speaking through Mr. Justice Spence, 18 Cal.App.2d at page 660, 64 P.2d at page 736: "It was conceded that nothing had been paid upon the judgment, and while the affidavits were conflicting in part, respondent's affidavit showed that *he had not attempted to enforce said judgment by execution because of his reliance upon appellant's repeated promises to pay the same.*

Appellant made no claim that he was prejudiced by the delay nor did he set forth any facts showing that it would be inequitable to permit the enforcement of the judgment." [Emphasis added.] Likewise in the instant case we have no showing of prejudice caused by the delay and have the repeated promises to pay.

In cases of estoppel to plead the statute of limitation, generally, it has been held that a mere agreement not to enforce an obligation will estop reliance on the statute where the defendant has accepted the fruits of the forbearance. In Phillips v. Phillips, 163 Cal. 530, 535, 127 P. 346, 348, the court said: "Aside from all questions regarding the consideration for the contract of forbearance and the sufficiency of its execution, defendant is prevented from setting up the bar of the statute of limitations upon clear principles of estoppel. She accepted the benefits of the contract. Her actions and those of her husband, as her agent, lulled the plaintiff into assumed security and caused him to postpone foreclosure until the expiration of the period mentioned in the agreement. Consequently she cannot now pursue the advantage ordinarily available to a litigant under the statute of limitations." See, to the same effect, Quanchi v. Ben Lomond Wine Co., 17 Cal.App. 565, 120 P. 427; 130 A.L.R. 8, 31. And that a promise to pay inducing forbearance establishes an estoppel. Rapp v. Rapp, 218 Cal. 505, 24 P.2d 161; Miles v. Bank of America etc. Assn., 17 Cal.App.2d 389, 62 P.2d 177; Roper v. Smith, 45 Cal.App. 302, 187 P. 454; 130 A.L.R. 8, 34.

In the instant case the appellant's affidavit is uncontradicted. Reliance is not placed alone upon the letter from decedent to appellant, to which reference is made in her affidavit, on the theory, as intimated in the opinion of Mr. Justice EDMONDS, that it is an acknowledgment tolling the time within which the judgment may be enforced. It is uncontradicted that decedent made repeated promises to make the payments provided for in the judgment and assured appellant she had nothing to worry about. Some of those statements were made orally and others were contained in the letter. Appellant relied upon them and the estoppel was established. The mere fact that the executrix asserted in her affidavit that appellant knew of the whereabouts of decedent and that he was solvent does not, as expressed by Mr. Justice EDMONDS, "cast doubt upon practically every material fact asserted by the appellant, and her claims in regard to the installment due in 1932 are directly at variance with the letter written by Mr. Lohman upon which she relies." Her knowledge of decedent's address and his solvency is wholly in harmony with her undenied affidavit that he misled her into believing that he would pay the judgment. Naturally she knew where he was inasmuch as they were in frequent contact. Rather than casting doubt on her affidavit, the executrix' statement merely completes the picture.

In view of the promises and assurances given by decedent to appellant, and the forbearance and considerate treatment which she accorded him as the result thereof, to now deny her the right to present her claim against decedent's estate for the payments which accrued under the judgment, and which were not paid, and to litigate such claim if rejected by the executrix, is, to my mind, a denial of that simple justice which is said to be "the hope of all who suffer—the dread of all who wrong."

SHENK, J., concurred.

SPENCE, Justice.

I dissent. This appeal presents the question of the propriety of the trial court's order denying to plaintiff the claimed right to enforce a divorce decree against the estate of her divorced husband following the death of the latter. The opinions of Mr. Justice EDMONDS and Mr. Justice CARTER express the view that the order of denial should be reversed but the authors of the opinions are not in accord as to the directions which should accompany such reversal. In my opinion, the order should be affirmed for the reasons hereinafter stated.

The divorce decree was entered in 1929 and enforcement was not sought until September, 1944, being more than 15 years after the entry of the decree and being at a time just prior to the expiration of the period allowed for the filing of claims against the estate. Plaintiff's motion was accompanied only by her own affidavit, which affidavit failed to show any diligence whatever in attempting to enforce the decree despite the fact that plaintiff claimed delinquencies on the property settlement installments dating back as far as 1931 and on the alimony installments back as far as 1935, being claimed delinquencies of 13 and 9 years respectively. In her affidavit, plaintiff set forth a copy of a letter which she alleged the deceased had written in 1932, which letter tended to cast doubt on at least a portion of plaintiff's claims concerning the alleged delinquencies. Furthermore, to adopt the words of Mr. Justice EDMONDS, 'the countershowing of the executrix cast doubt upon practically every material fact asserted by the appellant." Nevertheless, both the opinion of Mr. Justice EDMONDS and the opinion of Mr. Justice CARTER are necessarily predicated upon the assumption that the trial court was compelled to accept the unsatisfactory showing of plaintiff and to determine that the claimed delinquencies existed. I believe that such assumption is wholly erroneous and that the opinions based upon such assumption have the effect of usurping the fact-finding function of the trial court.

The Code of Civil Procedure provides "That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; * * *" Code Civ. Proc. § 2061, subd. 6. It has been said that this is "a mere commonplace rule." 10 Cal.Jur., § 359, p. 1140. In the light of this rule, the trial court was entirely justified in giving little, if any, weight to the allegations in plaintiff's affidavit. That affidavit bore within itself the seeds of its own destruction, or at least partial destruction, and it was countered by an affidavit which probably contained as strong a showing as could be made by respondent following the death of the deceased. It is true that there was no direct contradiction by respondent of the existence of the claimed delinquencies, but it stretches one's credulity to believe that claimed delinquencies of such long duration would have been permitted to exist against a solvent debtor, known to plaintiff to have been conducting an established plumbing business throughout the years in the city of the parties' residence, without any attempt whatever having been made to enforce such delinquencies. The fact that there was no direct contradiction is immaterial, for it is well settled that the trial court is not always bound to accept the sworn testimony of a witness even though there may be no evidence directly contradicting such testimony (10 Cal.Jur., § 362, p. 1143); and the same is true when the sworn testimony is presented by affidavit. Berg v. Journeymen Plumbers etc. Union, 5 Cal.App.2d 582, 42 P.2d 1091. It therefore follows that the trial court was not compelled to accept as true the allegations contained in plaintiff's affidavit, and that the order of denial was justified upon that ground.

There is a second ground, however, which I believe requires an affirmance of the order of the trial court denying enforcement of the 15-year-old divorce decree. We are not here dealing with the attempted enforcement of an ordinary money judgment but are dealing with the attempted enforcement of the anomalous type of decree entered by a court of equity in a divorce action, in the nature of a continuing alimony decree. The direct subject of attack on this appeal is an order of the same court of equity which entered the divorce decree, denying the enforcement of such decree. I am of the opinion that the trial court was at all times invested with discretion in determining whether any claimed delinquent installments accruing under such decree should be enforced in the divorce action by execution, and that since the death of the deceased husband the trial court was invested with discretion to determine whether leave should be granted to enforce the same by action against his estate. In any event, it seems clear that the trial court was invested with discretion where, as here, enforcement was not sought until more than five years after the entry of the judgment. If this be true, then in the absence of any showing of diligence on the part of plaintiff or, to follow the reasoning of Mr. Justice EDMONDS, in the absence of any satisfactory showing of diligence such as the law requires, I believe that the trial court's order denying enforcement as to all claimed delinquencies should be affirmed, as it cannot be said that the trial court abused its discretion in making its order of denial.

Mr. Justice EDMONDS and Mr. Justice CARTER, together with those of my associates who have joined in their opinions, reach the conclusion that plaintiff was entitled as "a matter of right" to enforcement of the claimed delinquencies on installments of alimony which accrued within five years prior to the time that enforcement was sought. Assuming for the purpose of the discussion of this point only, that the trial court was compelled to find that such claimed delinquencies existed, I cannot agree that plaintiff was entitled to the enforcement of such delinquencies as "a matter of right" or that the case of Shields v. Superior Court, 138 Cal.App. 151, 31 P.2d 1045, should be disapproved. It seems to me to be wholly inconsistent to hold, as does the opinion of Mr. Justice EDMONDS, that such enforcement was "a matter of right" but that such enforcement could be denied "upon equitable grounds." Enforcement is either a matter of right or a matter of discretion, but it cannot be both.

The view that plaintiff was entitled as a matter of right to enforcement of the claimed delinquencies on installments of alimony which accrued within five years prior to the time that enforcement was sought is necessarily based upon the following propositions: (1) That the provisions of section 681 of the Code of Civil Procedure govern the manner of enforcement of continuing alimony decrees, and (2) that said provisions of section 681 apply to installments on continuing alimony decrees which accrue more than five years after the entry of the decree but within five years prior to the time that enforcement is sought. Whatever doubt may exist concerning the first proposition, there can be no doubt concerning the untenability of the second. The applicability of section 681 is limited by the express terms of the section to enforcement "at any time within five years after the entry" of the judgment, and the provisions of that section cannot be relied upon here to establish the claim that enforcement was a matter of right more than 15 years after such entry.

The cases of DeUprey v. DeUprey, 23 Cal. 352, and Gaston v. Gaston, 114 Cal. 542, 46 P. 609, 55 Am.St.Rep. 86, are cited by Mr. Justice EDMONDS in support of the conclusion that such enforcement is a matter of right. The cited cases have no direct bearing on the problem before us. The DeUprey case dealt merely with the application of the statute of limitations in an independent action brought upon an installment judgment, and it was held that the statute of limitations did not start to run on each installment until such installment became due. It did not deal with enforcement by execution or with a motion made for leave to enforce in the action in equity in which the original judgment was entered. The Gaston case dealt merely with the duration of a lien expressly imposed by the court to secure the installment judgment. The installments on the judgment were regularly paid for 10 years and, upon default, the court in which the judgment had been entered ordered the sale of the property upon which the lien had been imposed. It was held that the lien had not expired two years after the entry of the judgment under the then provisions of section 671 of the Code of Civil Procedure, as the lien did not "derive its force from that section." The court further repudiated the claim that because more than five years had elapsed after the entry of the judgment "the judgment ceased to be of binding force, and process *could not issue* under it." (Emphasis added.) It is therefore obvious that the court was there discussing the question of the power of the trial court to enforce the installment judgment after such lapse of time, and was not discussing the question of whether the matter of enforcement was one of right or of discretion. The conclusions reached in the DeUprey and Gaston cases are clearly correct, but they do not support the statement by Mr. Justice EDMONDS that "the creditor is entitled, as a matter of right, to execution upon such a judgment for all amounts which have accrued within five years from the date of the application therefor."

It is doubtful whether section 681 of the Code of Civil Procedure, which deals with the enforcement of a judgment by execution and is claimed to make such enforcement a matter of right here, was ever intended to govern the enforcement of continuing alimony decrees. It would seem more logical to conclude, despite the assumption of the applicability of section 681 found in many of the cases dealing with continuing alimony decrees, that section 140 of the Civil Code, which provides that the trial court "may enforce" its continuing alimony decrees by any "remedy applicable," was intended to be the governing section. This question was discussed in Shields v. Superior Court, 138 Cal.App. 151, 31 P.2d 1045, but it was not necessary to decide the question there, and it is not necessary to decide it here, for the reason that in each case more than five years had elapsed after the entry of the decree before the motion for enforcement was made. It was there said on pages 153 and 154 of 138 Cal.App., on page 1046 of 31 P.2d: "As we view the situation in the present case, it is unnecessary to discuss these conflicting contentions. If the position taken by respondents is corrcet, then the issuance of execution was at all times a matter within the discretion of the trial court. If, on the other hand, the position taken by petitioner is correct, the question of whether she was entitled to the issuance of a writ of execution was to be determined by the provisions of sections 681 and 685 of the Code of Civil Procedure. The provisions of said section 681, relating to judgments generally, entitled the judgment creditor to a writ of execution as a matter of right 'at any time *within five years after the entry*' of the judgment. Under said section 685, a writ of execution may be had upon a judgment only 'by leave of court' after the lapse of five years '*from the date of its entry.*' The decree here was entered in 1924, and the motion for the issuance of execution was made in 1934, approximately ten years after the entry of the decree. Under either view, petitioner was not entitled to a writ of execution as a matter of right at the time the motion was made, but only in the discretion of the trial court. While it is true that a monthly installment had accrued and become payable each month during the five-year period immediately preceding the making of the motion for the issuance of execution and while it is further true, as pointed out by appellant, that the decree could not be modified as to sums already accrued. Cummings v. Cummings, 97 Cal. App. 144, 275 P. 245; Bruton v. Tearle, 117 Cal.App. 696, 4 P.2d 623, we are here dealing solely with the question of the *manner of enforcement* of the provisions of the decree. Assuming that sections 681 and 685 of the Code of Civil Procedure are the sections providing for the manner of enforcement as contended by petitioner, she was not entitled thereunder to the issuance of execution as a matter of right after the lapse of five years from the date of the *entry of the decree.* This view finds support in Parker v. Parker, 203 Cal. 787, 266 P. 283, and Radonich v. Radonich, 130 Cal.App. 250, 20 P.2d 51."

It therefore appears immaterial here whether section 140 of the Civil Code is deemed to be the governing section or whether sections 681 and 685 of the Code of Civil Procedure are deemed to be the governing sections covering the manner of enforcement of continuing alimony decrees. The conclusion seems inescapable under either view that none of the cited sections makes enforcement of a continuing alimony judgment a matter of right after the lapse of five years from the date of the entry of such decree. In my opinion, at least after the lapse of such 5-year period, the matter of enforcement of a continuing alimony decree is a matter which is committed to the sound discretion of the trial court, and an order of the trial court denying enforcement should not be reversed unless it clearly appears that there has been an abuse of such discretion. I am further of the opinion that when such enforcement is sought after the lapse of such 5-year period, and it is claimed the delinquencies have existed over a long period of years, the burden should be placed squarely upon the judgment creditor to make a clear and convincing showing concerning the existence of the delinquencies and of other facts which would appeal to a court of equity in exercising its discretion with respect to enforcement.

The case of Cochrane v. Cochrane, 57 Cal.App.2d 937, 135 P.2d 714, 715, cited by Mr. Justice EDMONDS in support of his conclusions, lends little, if any, support thereto. The division in the court in that case was not clearly drawn upon the question of whether the matter of enforcement was a matter of right or a matter within the discretion of the trial court, but rather upon the question of where the burden rested to show facts which should be considered by the trial court in the exercise of its discretion. Furthermore, it appears in that case that the judgment debtor, who was still living, "made no counter-showing."

The case of Corcoran v. Duffy, 18 Cal. App.2d 658, 64 P.2d 735, 736, cited by Mr. Justice CARTER, is clearly distinguishable and lends no support to his conclusions in the instant case. There the trial court had exercised its discretion by ordering execution to issue, and the sole question discussed was that of diligence. The judgment debtor there was still living and he conceded that nothing had been paid on the judgment at any time. Moreover, it was shown by the judgment creditor's affidavit not only that execution had been returned unsatisfied within five years after the entry of judgment, but also that the judgment creditor had thereafter executed at various times three formal instruments entitled "Acknowledgment and Promise to Pay." In each of these, the judgment debtor acknowledged that he owed the amount of the judgment with interest and that he had paid nothing thereon; in each, he promised to pay the same without fixing any date for such payment; and in each, it was recited that "the undersigned gives this acknowledgment and promise in order that said indebtedness shall not be barred by any statute of limitations." The court there affirmed the order granting the motion and it stated 18 Cal.App.2d at page 660, 64 P.2d at page 736: "The trial court's ruling upon the motion should not be disturbed in the absence of a showing of a clear abuse of discretion, and we find no such showing in the present case." Likewise here I find no showing of an abuse of discretion and in the absence of such showing, the action of the trial court should be sustained.

In summary, I am of the view that the order of the trial court denying enforcement cannot properly be reversed: First, because any order of reversal, with or without directions, must necessarily usurp the fact-finding function of the trial court with respect to the existence of the claimed delinquencies; and second, because any order of reversal, with or without directions, must necessarily not only usurp the fact-finding function of the trial court with respect to the allegations relating to diligence but must also substitute the discretion of this court for the discretion of the trial court in a case where no abuse of discretion on the part of the trial court has been shown.

With respect to the question of diligence, it must be recalled that no attempt was made to exercise the claimed right to enforcement until more than 15 years after the entry of the decree and at a time when the lips of the judgment debtor were sealed in death. According to plaintiff's allegations, delinquencies occurred within two years after the entry of the decree but no attempt was made to obtain enforcement before the lapse of the 5-year period. The only evidence purporting to corroborate in any manner the claims of plaintiff was the letter written by the judgment debtor in 1932, which related only to the situation at the time of writing, which was 12 years before enforcement was sought. Plaintiff strongly relies on that letter but that bit of evidence tends to cast doubt upon part of plaintiff's claims. Plaintiff's remaining allegation on the issue of diligence consisted of alleged conversations with the deceased, and I agree with Mr. Justice EDMONDS that such evidence constitutes "the weakest and most unsatisfactory of all kinds of evidence." The trial court was not compelled to believe the latter allegations, more particularly in the light of the counter-showing of respondent, but even assuming the truth thereof, I further agree with Mr. Justice EDMONDS where he says: "But if she chose, for more than five years, to rely upon his good intentions, as he expressed them to her, she cannot now say that she used the diligence which the law requires of her in the protection of her legal rights." It therefore appears that under any view of the evidence, it cannot be said here that the trial court abused its discretion in denying enforcement, and I do not believe that Mr. Justice CARTER'S conclusions can be reconciled with the recent decisions of this court in Butcher v. Brouwer, 21 Cal.2d 354, 132 P.2d 205; Beccuti v. Colombo Baking Co., 21 Cal.2d ?60, 132 P.2d 207; and Hatch v. Calkins, 21 Cal.2d 364, 132 P.2d 210.

In conclusion, I desire to state that I deem it most unfortunate that a majority of this court has reached the conclusion that regardless of the time when a continuing alimony decree may have been entered, and regardless of whether the judgment creditor may have exercised any diligence in attempted enforcement, such judgment creditor is entitled as a matter of right to enforcement at any time of those installments which may have accrued within 5 years of the time when enforcement is sought. It is a matter of common knowledge that there are countless thousands of old continuing alimony decrees, many of which were entered during the boom era of the 1920's and many of which have never been modified. It is also a matter of common knowledge that we have been through a long period of depression followed by several years of disturbed conditions attributable to the war, and that there are many debtors, including those who have served in the armed forces, who have been unable during these disturbed times to make the full payments specified under such old decrees, or even to pay counsel to obtain modification. In some cases, the parties have in practical effect modified such decrees by oral understandings, express or implied, to pay and accept amounts smaller than those specified in decrees entered during earlier years. Actual modifications by court order of these old decrees, if now possible, could not affect accrued installments, but the question arises: "Should the judgment creditor be held to be entitled to execution *as a matter of right* on alleged delinquencies accruing during the five years immediately preceding the application for execution to issue?" To answer this question in the affirmative, as do the opinions of Mr. Justice EDMONDS and Mr. Justice CARTER, will undoubtedly do grave injustice in numerous cases and may spell financial ruin for many who are now struggling for economic rehabilitation. On the other hand, the rule enunciated in Shields v. Superior Court, supra, 138 Cal.App. 151, 31 P.2d 1045, and recognized in many of the cases, would leave the matter of enforcement of continuing alimony decrees within the sound discretion of the trial court at all times and would place no undue burden upon the judgment creditor. In those cases in which it appears that the judgment debtor has died, I believe that the widest latitude should be allowed to the trial court in the exercise of its discretion, for it is obvious that it is ordinarily impossible for the representative of the deceased to make a full countershowing with respect to payments made or with respect to reasons or understandings for nonpayment of, or partial payment on, the accrued installments. In such cases, the probable prejudice, resulting from the delay in enforcement, is apparent.

For the reasons stated, I cannot join in the conclusion that the order of the trial court should be reversed but, on the contrary, I believe that the order denying enforcement should be affirmed.

SCHAUER, J., concurred.

WILK v. VENCILL et ux.*

Civ. 15467.

District Court of Appeal, Second District, Division 1, California.

Nov. 1, 1946.

Rehearing Denied Nov. 19, 1946.

Hearing Granted Dec. 23, 1946.

1. Specific performance ⚿33

A contract to sell property owned in joint tenancy by husband and wife, which contract was signed by husband only, was void ab initio and hence could not be specifically enforced.

2. Pleading ⚿354(1), 360(5)

A complaint for breach of contract to sell realty which belonged to husband and wife in joint tenancy, and which contract was signed by husband only, was properly dismissed without leave to amend where complaint affirmatively showed that contract was void ab initio.

3. Frauds, statute of ⚿126

A promise to execute an agreement required to be in writing must also be in writing.

4. Pleading ⚿354(1), 360(5)

Where complaint on its face affirmatively disclosed that it was legally impossible to supply deficiencies to set up a valid cause of action, complaint was properly dismissed without leave to amend.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Nat Wilk against Charles A. Vencill and his wife for specific performance of a contract to sell realty or to recover damages, wherein defendants filed demurrers. From a judgment of dismissal without leave to amend, plaintiff appeals.

Affirmed.

Albert G. Bergman, of Los Angeles, for appellant.

Samuel H. Robinson and Harold M. Heimbaugh, both of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from a judgment in the Superior Court, in and for the County of Los Angeles, dismissing an action for specific performance or damages, after the defendants' and respondents' demurrers to plaintiff's and appellant's fourth amended complaint had been sustained without leave to amend and a judgment of dismissal was entered thereon in favor of defendants and respondents herein.

The complaint in the action, which is for specific performance, alleges that, defendants, who are husband and wife, are joint owners of certain described property; that plaintiff entered into a written agreement with Charles A. Vencill, the husband, for the purchase and sale of said property, in words and figures as follows:

"Received of Nat Wilk, the sum of Ten Dollars as part payment for my real property located at 425 North Martel Ave., Los Angeles, California.

"The entire price to be paid for the above described property is the sum of Eighty-Nine Hundred Dollars and to be paid as follows:

"Five Thousand Dollars Cash in an escrow to be commenced within thirty days after a property settlement agreement is executed between the undersigned seller herein and his wife.

"Also this property to be sold to said Nat Wilk subject to two encumbrances wherein their total unpaid balances is the sum of approximately Thirty-Nine Hundred Dollars.

"Further this within option to purchase the above described property is made with the specific understanding that the undersign's wife will surrender possession thereof when and if she is able to procure other living accommodations.

"Dated July 24, 1945.
"Chas. A. Vencill

"I accept the within option.
"July 24, 1945.
"Nat Wilk"

It is further alleged that Mabel Vencill, the wife, orally agreed to sign the above document, but informed plaintiff that, "after said declaration, further informed this plaintiff that she would prefer to defer her execution of the sales agreement made by and between this plaintiff and Charles A. Vencill, and so accepted, consented and agreed to by defendant, Mabel Vencill, as above described, until she and her husband completed the execution and delivery as between themselves, of their said property settlement agreement, which defendant Mabel Vencill informed this plaintiff she expected would be done, and completed within approximately one week after said date of July 24, 1945, and that she would immediately thereafter sign the above described agreement for the sale by defendants, and both of them, of the above described real property to this plaintiff"; that later, on demand, said Mabel Vencill refused to sign the agreement. It is also alleged that said representations so made by Mabel Vencill were false and untrue and made fraudulently and without "intention of performing the same." It is also alleged that plaintiff lost an opportunity to purchase another home in the same neighborhood by reason of defendants' conduct, resulting in damages in the sum of $7,500. Additional appropriate details were included in the complaint. The prayer was for specific performance or, "if specific performance herein cannot be decreed," then for the alleged damages.

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* Subsequent opinion 180 P.2d 351.

It is contended on appeal that the court erred in sustaining the demurrer without leave to amend. It is argued in connection with this contention that, if permitted, deficiencies could be supplied that would set up a valid cause of action.

[1] The complaint on its face affirmatively exposes such contention as a legal impossibility. The contract relied on was void ab initio. And a void contract manifestly cannot be specifically enforced. The property described was owned in joint tenancy; the contract was signed by only one of the owners, hence the execution of the instrument was incomplete. Barber v. Burrows 51 Cal. 404. It is true that this fact does not appear upon the face of the instrument, but the complaint avers it, and the effect is the same.

[2-4] The attempt to set up a cause of action for damages is, necessarily, based on breach of contract. Here, the complaint again affirmatively shows that there was no contract to "breach." And it follows, therefore, that no such action will lie. The contention that the wife's promise to sign, followed by the refusal to do so, amounts to fraud and operates as an estoppel is without merit. The conduct of the wife, as appears affirmatively in the allegations, in no sense amounted to fraud or deceit. Moreover, a promise to execute an agreement required to be in writing, must also be in writing. There was no valid agreement between plaintiff and defendant Mabel Vencill; no valid obligations were imposed and no privileges upon either in behalf of the other were ever conferred. See Mullarky v. Young 9 Cal.App. 686, 100 P. 709. All of the foregoing appears affirmatively in plaintiff's complaint, from which it follows that nothing could be added thereto by amendment that could establish a cause of action.

The judgment is therefore affirmed.

YORK, P. J., and WHITE, J., concur.

McCURDY v. HATFIELD. *

Civ. 15285.

District Court of Appeal, Second District,
Division 1, California.
Oct. 21, 1946.

Rehearing Denied Nov. 8, 1946.
Hearing Granted Dec. 19, 1946.

1. Physicians and surgeons 🔑18(8, 9)

In malpractice action growing out of treatment of plaintiff's fractured elbow by defendant physician, evidence failed to establish that defendant departed from routine treatment or that he failed to exercise that degree of care and skill customarily used by the profession in and about the locality where the treatment was administered, and hence nonsuit was warranted.

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* Subsequent opinion 183 P.2d 269.

2. Evidence ⚷52
Physicians and surgeons ⚷18(8)

While impropriety of particular medical treatment can generally be established only by expert medical testimony, such evidence is unnecessary where matter is one of general knowledge.

3. Physicians and surgeons ⚷18(6)

That patient failed to respond to treatments or that results of an operation are disappointing does not necessarily establish as a fact physician's failure to exercise that degree of care and skill customarily used by profession in and about locality where treatment is administered.

◆

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by Bess McCurdy against J. Gordon Hatfield for damages from alleged malpractice. From a judgment for defendant, following the granting of defendant's motion for nonsuit, plaintiff appeals.

Affirmed.

J. M. Clements and William V. Krowl, both of Los Angeles, for appellant.

Reed & Kirtland, of Los Angeles (Henry E. Kappler, of Los Angeles, of counsel), for respondent.

DORAN, Justice.

This is an action for damages alleged to have resulted from malpractice on the part of defendant in the treatment of an injured arm. At the conclusion of plaintiff's case, a motion for a nonsuit was granted and from the judgment that followed, plaintiff appeals.

The complaint alleges: "That on the 4th day of January, 1944, the plaintiff received an injury to her right arm and did on said date employ the defendant to treat her injuries, and the said defendant from that time on, and during the months of January, February and March of 1944, continued to treat, operate on, and advise plaintiff with reference to her injuries, and the said defendant did so carelessly, negligently and unskillfully operate on, treat and advise plaintiff that he caused plaintiff's right arm to be severely and permanently injured in that her right shoulder, right elbow and right hand have become permanently stiff and disabled and have caused plaintiff to suffer grievous mental and physical pain and suffering and permanently injured her in her health, strength and activity, * * *."

At the trial, plaintiff examined defendant under section 2055, Code of Civil Procedure, which, together with plaintiff's testimony, constituted plaintiff's case.

It is contended by appellant that:

"I. It is well settled that a plaintiff in a malpractice action can establish his case by the testimony of the defendant therein."

"II. Wrongful treatment having been proven as given, the question of proximate cause is a question of fact for the jury."

"III. The doctrine of Res Ipsa Loquitur applies where the plaintiff was under the influence of an anaesthetic at the time of the injury."

Respondent, "concedes that in a malpractice action the plaintiff may be able to establish a case by the testimony of the defendant himself," and also concedes, "that where a patient is unconscious on an operating table and receives injury to a healthy portion of his body in no manner related to the surgical or operation procedure the doctrine of res ipsa loquitur may apply," but, it is contended by respondent, "These rules of law, however, have no application to the facts in the case at bar".

[1, 2] In connection with the three above-mentioned contentions, appellant argues that, "From the facts and authorities, as heretofore set forth, it appears that malpractice on the part of the defendant was proven by reason of the fact that the defendant, according to the standards established by his own testimony, manipulated the plaintiff's arm prior to the time when there was sufficient callous formation in the fractured elbow, and, furthermore, defendant was guilty of malpractice in that he forcefully and violently manipulated plaintiff's fractured elbow beyond the point of tolerance." There was no evidence that the defendant departed from the routine treatment in the circumstances; there was no evidence that defendant

failed to exercise that degree of care and skill customarily used by the profession in and about the locality where the treatment was administered. "According to the standards established by his own testimony," as quoted above, manifestly, is appellant's motion or opinion of such testimony. And it is on such an assumed premise that appellant's conclusions are based. Appellant relies on Anderson v. Stump, 42 Cal.App.2d 761, 109 P.2d 1027, 1031. There, as pointed out in the opinion, the damage resulted from the failure to use proper and necessary precautions to prevent infection during the treatment of the patient. The court declared: "The foregoing quoted testimony particularly considered in connection with the question as to whether the glove used was or was not sterilized, and with all of the other circumstances shown by the evidence and especially the circumstance that the infection developed within the vagina, the question as to whether the glove used was properly sterilized, or was sterilized at all, became one peculiarly within the province of the jury to determine, as did also that as to whether defendant wore a sterilized gown or his street clothes." Obviously, no expert testimony is necessary in such circumstances. The Anderson case, supra, at page 765 of 42 Cal.App.2d, 109 P.2d 1029, cites Inderbitzen v. Lane Hospital, 124 Cal.App. 462, 12 P.2d 744, 13 P.2d 905, and quotes therefrom the following: "While it is the general rule that the propriety or impropriety of particular medical treatment can only be established by expert medical testimony, this rule is subject to the exception that, if the particular matter is one of general knowledge, expert evidence is not necessary." Also it is said in that case: "We will likewise take judicial knowledge of the danger of infection to a woman about to give birth to a child from a vaginal examination performed with unsterilized hands."

[3] In the within action, and in connection with the treatment administered, there were no matters of common knowledge which a jury or a court could properly take into account in deciding the issues. The fact, if it is a fact, that the patient fails to respond to treatment, or that the results of an operation are disappointing, does not necessarily establish as a fact, the failure to exercise that degree of care and skill customarily used by the profession in and about the locality where the treatment is administered.

In the light of the record, it was not error to grant the motion. The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

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76 Cal.App.2d 592

SECURITY INV. CO. OF RIVERSIDE v. DOUGLAS et al.

Civ. 15289.

District Court of Appeal, Second District, Division 1, California.

Oct. 23, 1946.

As Modified on Denial of Rehearing Nov. 21, 1946.

Hearing Denied Jan. 16, 1947.

1. **Taxation** 🔑688

The method of publication of delinquent tax list, being for legislative direction generally, is subject to curative power of legislative body. Revenue and Taxation Code, § 3391; St.1943, p. 1993.

2. **Taxation** 🔑688

The fact that publication of parts of delinquent tax list in different newspapers is fatally defective procedure does not of itself prevent exercise of Legislature's curative power, but question is whether application of such power under facts would transgress inhibitions of federal and state Constitutions. Revenue and Taxation Code, § 3391; St.1943, p. 1993.

3. **Constitutional law** 🔑290(3)
Taxation 🔑688

Actual publication of portion of delinquent tax list, including property claimed by grantee in tax deed from state and successor in title of purchaser at sale on foreclosure of city street improvement bonds, in newspaper of general circulation published in county and city wherein property was located, was adequate notice to comply with due process, though other portions of list were published in other newspapers, so that such defective publication was cured by statute validating certain acts relating to taxation of property. Revenue and Taxation Code, §§ 3391, 3691 et seq.; St.1911, p. 730; St.1943, p. 1993.

4. Taxation ⚿786

Tax deeds to and from state and deeds issued after sales for delinquent municipal special assessments are on a parity, and holders of both classes of deeds to same lots own them as tenants in common. Revenue and Taxation Code, § 3900.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by the Security Investment Company of Riverside against Clinton R. Douglas, Mendel E. Fink, and others to quiet title to three city lots. Judgment for plaintiff, and defendant Fink appeals.

Modified, and affirmed as modified.

John F. Bender and G. Loshoncy, both of Los Angeles, for appellant.

Donald J. Dunne, of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal taken from a judgment and decree quieting plaintiff and respondent's title to three lots in the city of Los Angeles.

Plaintiff and respondent, hereinafter called "plaintiff," bases its title to each of said parcels of real property upon three tax deeds issued to the State of California in 1936 and tax deeds from the State of California to plaintiff issued October 13, 1944, pursuant to a sale held on said date in accordance with the provisions of Division 1, Part 6, Chapter 7 of the Revenue and Taxation Code. At the trial it was stipulated that the property here involved was sold for taxes to the state on June 30, 1931, deeded to the state in 1936, and on October 13, 1944, was sold by the state to plaintiff.

Defendant and appellant Mendel E. Fink, hereinafter called "defendant," bases his title to the three lots here in question upon three street improvement bonds issued on March 3, 1922, by the Treasurer of the City of Los Angeles pursuant to the provisions of the Improvement Act of 1911, St.1911, p. 730, then in force and effect.

On October 30, 1935, Trompeter and Company instituted an action in the Superior Court of Los Angeles County for the foreclosure of said street improvement bonds. On February 21, 1939, a judgment was entered in favor of Trompeter and Company, and thereafter, on March 4, 1940, pursuant to such judgment, a commissioner's deed was issued to Trompeter and Company which was duly recorded on March 8, 1940.

Through the medium of duly recorded deeds, the property changed hands several times until on October 13, 1944, a deed was recorded, executed by The Sterling Company, a corporation, to defendant, conveying to him said property. Defendant's title if any, therefore rests upon and flows by direct chain of title from street improvement bonds issued on March 3, 1922, by the City of Los Angeles pursuant to the provisions of the Improvement Act of 1911, and which bonds were foreclosed in 1940 by virtue of the commissioner's deed to the grantee named therein.

In the trial court, defendant introduced into evidence the delinquent tax list for the year 1935 showing that the publication of the entire delinquent list was had in more than one newspaper of general circulation in the county. In the court below and now on appeal, defendant contends that such divided publication was contrary to section 3766 of the Political Code (now included in sections 3391 et seq. of the Revenue and Taxation Code), and that tax sales or tax deeds in reliance thereon were therefore void.

Plaintiff, on the contrary, contends that the defective publication, though it might be considered as fatal under the in invitum rule, was cured by the curative act enacted by the legislature in 1943, entitled "an act to validate certain acts of counties, cities and counties and of their officers relating to taxation of property" (Stats.1943, p. 1993).

Defendant urges that his bond became a lien on the property in 1922, which was prior to any tax delinquency and was prior to the tax deed issued in the case at bar, which was in 1936; that his equitable estate was converted into a legal estate at the time the commissioner's deed was executed on March 4, 1940, which was prior to the passage of the aforesaid curative act of 1943; that his vested right in the property here involved intervened prior to the effective date of the curative act of 1943, and, therefore, said act is not applicable. In this regard, defendant relies upon the cases of Miller v. McKenna, 23 Cal.2d 774, 147 P.2d 531; Chambers v. Duvall, 26 Cal. 2d 139, 156 P.2d 921; City of Compton v. Boland, 26 Cal.2d 310, 158 P.2d 397, and Barrett v. Brown, 26 Cal.2d 328, 158 P.2d 567. The holding in these cases may be epitomized by saying that the aforesaid curative act may not be utilized to deprive one of his estate without due process of law and "by a mere legislative rescript pronounce as valid a deed which was void when it was made." Miller v. McKenna, supra, 23 Cal.2d at page 784, 147 P.2d at page 537.

[1] Barrett v. Brown, supra, relied upon by defendant, was a case involving alleged defective publication of a delinquent tax list, in that only a portion of such tax list was published in the newspaper containing notice of the tax delinquency affecting the property involved. In the cited case, the Supreme Court, 26 Cal.2d at page 330, 158 P.2d at page 569, said:

"Here there was an actual publication of a portion of the delinquent tax list which included the plaintiff's property. This publication was in a newspaper of general circulation published in the county and in the city in which plaintiff's property was located. The publication was complete in every respect except that it did not include all of the property in the county delinquent for nonpayment of taxes and sought to be sold at the same time. As above stated the publication of the entire delinquent list was split between more than one newspaper of general circulation published in the county. We may assume the application of the general provision as a prerequisite step in tax sale proceedings. We may also assume that the defective publication, without more, would have been fatal under the in invitum rule. But in 1943 the Legislature enacted a curative act entitled: 'An act to validate certain acts of counties, cities and counties and of their officers relating to taxation of property.' Stats.1943, p. 1993. The content and effectiveness of that act and its application in pending litigation have been considered in the recent cases of Miller v. McKenna, 23 Cal.2d 774, 147 P.2d 531; Chambers v. Duvall [26 Cal.2d 139], 156 P.2d 921; and City of Compton v. Boland [26 Cal.2d 310], 158 P.2d 397. It was thereby determined that, assuming certain jurisdictional steps to have been taken, the details in the mode or manner of pursuing those steps may be changed by the Legislature within constitutional bounds and that if such steps have been defectively pursued the irregularities may be cured by the validating act. In City of Compton v. Boland, supra, it was said: 'If the notice is adequate to comply with due process the Legislature may make changes in the mode or manner of giving notice, or the details of the matter to be contained therein.' There is no question that notice of the delinquency of the tax on the plaintiff's property was contained in a newspaper of general circulation published in the county in accordance with the general provision of the statute. The fact that other property was not included in the publication does not vitally disparage the fact of notice to the plaintiff; nor has the plaintiff been deprived of any constitutional right. Cases of so-called 'split' publication or publication in a supplement to, rather than in the newspaper itself, where a curative act was not involved, are not in point. Such cases deal with the question of the intent of the Legislature regarding publication.

"The intent of the Legislature by the general provision to require publication of the entire delinquent list in one newspaper may not be disputed. We have here the question of the effect of the validating act in respect to the sale of property included in the publication of a portion of the delinquent list, when another portion of the delinquent list was omitted from that publication or was published in another newspaper. Our decisions in the foregoing cited cases are determinative of the question and, since the method of publication is of legislative direction generally, it is also subject to the curative power of the Legislature. The effect of the validating act in this case is to bring the publication of the 1937 delinquent list in Los Angeles County under the general provision of section 3766 of the Political Code (now Rev. & Tax. Code, § 3356), and to cure the irregularity in the method pursued thereunder."

The foregoing decision is determinative of the question presented to us in the instant case wherein the facts are analogous. We therefore conclude that the notice herein was adequate to comply with due process, and the method of publication being of legislative direction generally, it is also subject to the curative power of the legislative body.

[2] Relying on the case of Miller v. McKenna, supra, wherein the Supreme Court held that a tax delinquency in the year 1911 was void because of a defect in the notice of sale, defendant contends that in the case now engaging our attention the curative act of 1943 affords plaintiff no relief because defendant acquired "intervening rights" prior to the enactment of said curative act in 1943. In the case last above cited, as well as in the cases of Chambers v. Duvall, supra, and City of Compton v. Boland, supra, it was determined that, assuming certain jurisdictional steps to have been taken, the details in the mode or manner of pursuing those steps may be changed *within constitutional bounds*, and that if such steps have been defectively pursued the irregularities may be cured by the validating act. That the procedure adopted herein relative to "split" publications of the delinquent tax list in question was fatally defective does not of itself prevent the exercise of the curative power, for, as said in Miller v. McKenna, supra, 23 Cal.2d at page 781, 147 P.2d at page 535, "If it was not fatally defective it would stand in no need of the healing power." The question, therefore, is whether application of the curative power under the facts of this case would transgress the inhibitions of the federal and state constitutions. In other words, was the defect herein jurisdictional. In Miller v. McKenna, supra, 23 Cal.2d at page 782, 147 P.2d at page 536, jurisdictional requirements are defined as:

"(a) A duly constituted taxing authority;

"(b) property to be taxed within the territorial jurisdiction of the taxing body;

"(c) property or subject matter legally subject to the tax; and

"(d) sufficient notice and opportunity for hearing to constitute compliance with due process."

[3] There can be no question but what the first three requirements were present in the case now before us, and we are persuaded that the fourth requirement was also met. As heretofore pointed out, there was an actual publication of a portion of the delinquent tax list which included the property claimed by defendant. The publication was in a newspaper of general circulation, published in the county and in the city in which such property was located. As was said in Barrett v. Brown, supra, 26 Cal.2d at page 331, 158 P.2d at page 569, "The fact that other property was not included in the publication does not vitally disparage the fact of notice to the plaintiff; nor has the plaintiff been deprived of any constitutional right." We therefore hold that, under the facts of the instant case, the publication or notice given was adequate to comply with due process.

[4] Finally, defendant contends that tax deeds to and from the state and special assessments, or deeds issued thereon, are on a parity, and that the holder of a deed from the state based upon a sale for delinquent general taxes does not have a right superior to that of the holder of title by deed after sale for delinquent special assessments. Revenue & Taxation Code, § 3900.

In this contention defendant must be upheld. Under the facts of the case with which we are here concerned, and upon the authority of Monheit v. Cigna, 28 Cal.2d 19, 168 P.2d 965, it must be held that the holders of deeds herein own the property as tenants in common.

By its complaint filed herein, plaintiff sought to quiet title to five lots numbered 458, 459, 460, 461 and 462. By his answer defendant disclaimed any right, title or interest in or to lots 461 and 462. That portion of the judgment quieting title in the last two mentioned lots in plaintiff must stand.

For the reasons herein stated, the judgment is therefore modified to provide that the title to lots 458, 459 and 460 here involved is held by plaintiff and defendant Mendel E. Fink as tenants in common, each owning an undivided one-half interest therein subject to a lien in favor of each tenant against the entire property in the amount which was paid for his or its interest, and as so modified, the judgment is affirmed. Neither party to recover costs on this appeal.

YORK, P. J., and DORAN, J., concur.

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76 Cal.App.2d 645

PEOPLE v. TOMASELLO.

Cr. 1974.

District Court of Appeal, Third District, California.

Oct. 29, 1946.

1. Criminal law 🔑572

Evidence sustained conviction of robbery as against claim of alibi.

2. Robbery 🔑24(1)

In robbery prosecution, testimony of prosecuting witnesses was not rendered inherently improbable because it was contradicted by witnesses for the defense tending to establish an alibi for defendant.

3. Criminal law 🔑739(2), 742(1)

In robbery prosecution, weight to be given the testimony of the witnesses and their credibility as regards existence of an alibi were for jury.

◆

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Manuel Thomas Tomasello was convicted of robbery, and he appeals.

Judgment affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and James O. Reavis, Deputy Atty. Gen., both of Sacramento, for respondent.

ADAMS, Presiding Justice.

Defendant was convicted by a jury of robbing one Ernie Paullo of the sum of $2,200, the defendant being at the time armed with a pistol. On this appeal from the judgment, no motion for a new trial having been made, it is contended that the conviction is not sustained by the evidence, but is contrary thereto, it being urged particularly that defendant's testimony and that of certain of his relatives established an alibi for defendant, and was of such a character as to render the testimony of the prosecution witnesses inherently improbable.

There is no merit in such contention. Ernie Paullo, the complaining witness, testified that on October 7, 1945, he was employed at the Horseshoe Club in Stockton. About 1:30 a.m. he closed the place, leaving a janitor and a dishwasher in the building. As he approached his car which was parked alongside the Club, he received a command, from one of two men, to stick up his hands. Thereupon Tomasello ordered him to open the door of the Club, which he did. The three then entered and a demand was made for money which the two men proceeded to take from the cash register and cash drawers. Paullo, the janitor and the dishwasher were then forced into another room, and were tied up with some towels and aprons. The two men then departed with the money. This witness positively identified Tomasello as did the janitor and the dishwasher, and the latter two corroborated the testimony of Paullo. A woman who worked in the Club as a waitress also identified defendant as a person she had seen there between 7:30 and 8:30 p.m. on October 6.

Defendant, testifying on his own behalf, denied that he had ever been in the Horseshoe Club, and categorically denied the testimony of the prosecution witnesses. He further testified that he was at his mother's home in San Jose the night of the robbery; that he had arrived there the evening of October 6 on his way back from Oregon, traveling by automobile; that he went to San Francisco the morning of October 7 with his brother and the latter's "girl friend," and there sought and secured employment on a ship. He produced a paper dated October 8, 1945, which ordered his assignment to a designated ship, and also a pass to the ship (undated). On cross-examination he stated that it was on the 8th that he had gone to San Francisco and that he had spent the 7th at San Jose. For the purpose of impeachment, statements he had made to the district attorney shortly after his arrest in January, 1946, in which he had said that he had gone to San Pedro on October 7, 1945, and returned after spending about five hours there, were introduced. But defendant denied at the trial that he had gone to San Pedro or that he had ever so stated.

Defendant's mother, called for the defense, testified that defendant had come to her home in San Jose about 6:00 o'clock in the afternoon of October 6, 1945, that he was there the next day, Sunday, and that he left on Monday morning with his brother and a girl, on his way to San Francisco to "sign up." Defendant's brother also testified that defendant arrived in San Jose on the 6th, had dinner with his mother, the brother and a sister, slept with the brother that night, was there on Sunday, and went to San Francisco on Monday when they both signed up for service in the merchant marine. Defendant's sister also testified, stating that when she arrived at her home in San Jose after work, on the 6th, defendant was there and that he remained there until Monday morning when he went to San Francisco.

Defendant admitted that he had previously been convicted of robbery of the second degree, had been paroled from San Quentin, but had violated his parole and was, at the time of his trial, serving the remainder of his original term at Folsom Prison.

[1-3] In view of the conflict presented by the evidence as above outlined, it cannot be said that the verdict of the jury or the judgment of the trial court is without support in the evidence. It therefore presents no question for review by an appellate court. The testimony of the prosecution witnesses was not rendered inherently improbable because it was contradicted by witnesses for the defense. People v. Jackson, 63 Cal.App.2d 586, 147 P.2d 94. The weight to be given the testimony of the witnesses and their credibility were matters for the jury's determination. In People v. Foster, 198 Cal. 112, 117, 127, 243 P. 667, where an alibi was relied upon by the defendant in a robbery case, the court said that the alibi testimony was to be considered along with all the other evidence in the case; and a judgment of conviction was affirmed, though the mother of the defendant, three brothers and two sisters were called in support of his alibi defense, as against the testimony of one witness for the prosecution who identified defendant as the person who committed the crime. Also see People v. Bradley, 71 Cal.App.2d 114, 119, 162 P.2d 38, and cases there cited.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

76 Cal.App.2d 606

DREXLER v. HUFNAGEL.

Civ. 15400.

District Court of Appeal, Second District, Division 1, California.
Oct. 24, 1946.

1. Records 🔑9(8)

In action by owner of easement to require owner of title to deliver his duplicate certificate of title to permit memorial of filing of two grants of easement to be entered upon original certificate and duplicate thereof, complaint was not fatally defective on ground that first instrument conveying easement from defendant to plaintiff's grantor did not comply with land title law where plaintiff's proceeding was instituted to comply with such law and enable registrar to accept instruments for filing. Gen. Laws, Act 8589, §§ 47–49, 52–55, 58, 60, 98.

2. Records ⚷9(8)

In action by owner of easement to require owner of title to deliver his duplicate certificate to permit memorial of execution of grants of easement to be entered upon original certificate and duplicate, complaint was not fatally defective because complaint alleged ownership of plaintiffs on date different from date in instrument from plaintiff's grantor, where defendant did not deny execution of grant conveying easement but sought to avoid it upon technical grounds. Gen. Laws, Act 8589, §§ 47, 98.

3. Easements ⚷51

The grant of an easement in general terms will ordinarily be construed as creating a general right of way, capable of use in connection with dominant tenement for all reasonable purposes.

DORAN, J., dissents.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by George L. Drexler and another against Frank Hufnagel to require defendant to deliver his duplicate certificate of title upon a designated lot in order to permit a memorial of execution and filing of two grants of easement to be entered upon the original certificate and duplicate thereof. From an adverse judgment, defendant appeals.

Affirmed.

John J. Craig, of Los Angeles, for appellant.

T. G. Dalton, of Los Angeles, for respondents.

YORK, Presiding Justice.

The instant action was filed pursuant to section 98 of the Land Title Law, Deering's Gen. Laws, Act 8589, which provides that a registered owner or other person in interest may apply by petition to the superior court upon the ground "that new interests have arisen or been created which do not appear upon the certificates * * * for an order correcting or altering any certificate to comply with the true facts as shown by the petition and proof adduced and the court shall have jurisdiction to hear and determine the petition after notice to all parties in interest. The court shall issue an order summoning all persons * * * interested * * * to appear * * * and produce their duplicate certificates and show cause why such omissions, * * * or change, or alteration, should not be corrected or made."

From a judgment ordering defendant to produce and deliver his duplicate certificate of title No. HO—70415 upon Lot 26 of Tract No. 2402, in order to permit a memorial of the execution and filing of two grants of easement to be entered upon the original certificate and the duplicate thereof, defendant appeals.

The petition for order to produce duplicate certificate of title alleges that Lot 26 of Tract No. 2402 is registered land; that on January 28, 1939, appellant Frank Hufnagel and his wife, Dorothy Hufnagel, as owners of said Lot 26, executed a grant of easement over the southerly 9 feet thereof to George Knarr and Eugenie Knarr, which said easement was made appurtenant to Lot 116, Hollywood Valley View Tract, both lots situate in the County of Los Angeles; that thereafter, on February 3, 1945, the Knarrs "transferred, granted and conveyed to petitioners George L. Drexler and Antoinette Drexler, an easement over the said southerly 9 feet of Lot 26 of Tract No. 2402, being the same easement referred to in the grant of January 28, 1939, and which was made appurtenant to Lot 116 of the Hollywood Valley View Tract.

It is further alleged that petitioners (respondents) have demanded that appellant produce his duplicate certificate of title in order that they may file with the Registrar of Titles the two grants of easement, but that appellant "refuses and has at all times herein mentioned refused to produce or surrender the said Duplicate Certificate No. HO—70415 to the Registrar of Titles so as to enable the petitioners to file the said instruments and to enable the said Registrar of Titles to enter the proper memorials thereon."

Appellant here urges that (1) the complaint does not state facts sufficient to constitute a cause of action; and (2) the instruments sought to be memorialized are so ambiguous, indefinite and uncertain in their terms as to give no notice of the type of easement claimed, and are therefore not entitled to registration.

[1] In connection with his first point, appellant claims the petition is fatally defective for the reason that the first instrument conveying the easement from appellant to the Knarrs not only did not comply with the terms of sections 47, 48, 49, 52, 53, 54, 58 and 60 of the Land Title Law, "but specifically did not comply with section 55 thereof which provides that unless it was filed, no title passed."

Section 55, supra, provides that any instrument purporting to transfer, lease or encumber registered land "shall take effect only by way of contract between the parties thereto, and as authority to the registrar to register the transfer, mortgage, lease, charge, or other dealing upon compliance with the terms of this act. On the filing of such instrument, the land, estate, interest, or charge shall become transferred, mortgaged, leased, charged, or dealt with according to the purport and terms of the deed, mortgage, lease, or other instrument."

The instant proceeding was instituted in order to comply with said section 55 and enable the registrar to accept the instruments for filing, because both section 48 and section 60 of the act require that, before the registrar can accept such instruments for filing, appellant's duplicate certificate of title must be surrendered to the registrar. The other sections of the act as to which appellant directs attention have to do with acts to be performed at the time an instrument is presented to the registrar for filing. For example: section 47 requires that "Any instrument offered for filing with the registrar * * * seeking to affect registered land, must have noted thereon a statement of the fact that the land sought to be affected is registered land, with the name of the registered owner and with the number or numbers of the certificate or certificates of the last registration thereof. Otherwise none of said instruments shall be filed, nor shall the same affect the title of the or any part of the land sought to be affected, nor will the same impart any notice thereof to the registered owner or to any person dealing with such land." As a matter of practice, if an instrument offered for filing does not contain the information required by section 47, it becomes the duty of the registrar to see that the omission is supplied by an endorsement upon the instrument before he accepts it for filing.

[2] Appellant also urges that "the purported grant of easement under the second document mentioned in Plaintiffs' Petition can * * * be of no effect for it will be seen that the complaint alleged the ownership of plaintiffs to the dominant tenement as of February 6, 1945, whereas the date of the instrument purporting to convey an easement by Knarrs to the Drexlers is February 3, 1945."

Appellant does not deny the execution of the grant of January 28, 1939, conveying an easement to the Knarrs over the southerly 9 feet of Lot 26, Tract No. 2402, but seeks to avoid it upon technical grounds which, as has been pointed out herein, are not available to him. The trial court found that prior to January 28, 1939, the Knarrs were the owners of Lot 116, Hollywood Valley View Tract, and that since February 6, 1945, appellant has been the owner of said Lot 26, and the respondents have been the owners of said Lot 116.

As heretofore stated, the instant proceeding was filed pursuant to section 98 of the Land Title Law, the petition alleging that respondents were the owners of new interests which did not appear on the records in the registrar's office. The allegations of the petition were sufficient under the requirements of said section 98.

[3] Moreover, it is not the province of this proceeding to determine the extent, manner or mode of use of the easement granted by appellant to the Knarrs and subsequently acquired by respondents through the acquisition of the dominant tenement and by express grant from the Knarrs. Suffice to say that the grant of an easement in general terms will ordinarily be

construed as creating a general right of way, capable of use in connection with the dominant tenement for all reasonable purposes. 3 Tiffany on Real Property, 3rd Ed., *322* § 803.

For the reasons stated, the judgment is affirmed.

WHITE, J., concurs.

DORAN, J., dissents.

76 Cal.App.2d 679

PEOPLE v. PALMER et al.

Cr. 4023.

District Court of Appeal, Second District, Division 1, California.

Nov. 1, 1946.

1. Robbery 🔑26

In robbery prosecution, whether accused aided and abetted in robbery by providing a quick get-away in automobile to avoid apprehension was for jury. Pen. Code, § 31.

2. Criminal law 🔑1172(1)

In robbery prosecution, giving instruction that fact that court gave instructions regarding particular rules of law must not be taken as an indication that rules applied to case on trial, or as indicating that court considered them necessarily applicable, and that jury should not consider instructions not applicable to facts found, although possibly superfluous, was not error.

3. Criminal law 🔑822(1)

Instructions must be considered as a whole.

4. Criminal law 🔑1172(1)

In robbery prosecution, instruction that jury should not single out any sentence or individual point and ignore the other but should consider all instructions as a whole and to regard each in light of all others was not prejudicial where under all instructions jury was fairly and fully instructed as to law applicable to the facts.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Hubert D. Palmer and Virginia McDavid were convicted of robbery in the first degree and Virginia McDavid appeals.

Affirmed.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Defendants were jointly charged in an information containing two counts with the crime of robbery, and the jury found them guilty of robbery of the first degree. From the judgment of conviction which followed, and also from the order denying the motion for a new trial, defendant Virginia McDavid alone has perfected this appeal.

It is here urged (1) that the evidence is insufficient to justify the judgment of conviction; and (2) that the court committed prejudicial error in the giving of instructions.

The record discloses that about 4 a. m. of November 24, 1945, two sailors, Larry L. Tyson and James E. Banks, were standing near a service station at 9th Street and Central Avenue in the city of Los Angeles, waiting for a trolley to return them to their naval base at Long Beach. At that time defendants were the sole occupants of a Buick automobile standing in the service station with appellant McDavid at the wheel. James Moore, the attendant on duty at the station, testified that a Buick came in to the station sometime between 2:30 and 3:30 a. m., on the date mentioned, at which time a group of sailors were standing on the corner 30 or 40 feet distant from appellant's automobile. Appellant called to the boys on the corner, and Tyson recalled that more than two of them walked over to the car. The attendant Moore did not hear appellant call to the boys, but he saw Tyson and some other boys go over to the Buick. Appellant asked Tyson where he was going and was told "Long Beach", whereupon she offered a free ride to Long Beach in her car. The two sailors got in and sat in the back seat. Moore changed the battery in the Buick and made a memorandum of the license number of the car together with the name and address of the owner. He saw Tyson and Banks get into the car and saw them sitting in the back seat when the car drove from the station with appellant at the wheel and defendant Palmer sitting beside her. Shortly after they started off, appellant asked the boys, "Wouldn't you all like to go out and have some fun before you go to Long Beach?" to which they replied, " 'No,' we weren't going out to have any fun, 'We haven't enough money'." Upon appellant's suggestion, Banks took off his Navy pea jacket, climbed into the front seat and sat between appellant and defendant Palmer, whereupon appellant said, "We will go to one of my girl friend's house, call up one of my girl friends, and we will go out and have fun." The boys told her "she didn't need to do that, we didn't have enough money for that, and she asked us how much money we had." Tyson told her he had $5 and appellant said, "You all no got enough money to go anywhere and have fun. You can get out here, if you want to." Meanwhile, appellant drove along without making a stop, and defendant Palmer talked to Banks about a certain watch, which Tyson said he saw Banks wearing when they got in the Buick. Defendant asked whether Banks would like to pawn his watch and Banks answered in the negative. Appellant stopped the automobile near Central Avenue and 27th Street, at which time the defendant Palmer, Tyson and Banks got out, Banks and Palmer preceding Tyson. The witness Tyson testified that defendant Palmer drew a gun on them and said, "Well, I am just going to take the five dollars you all have", and "snapped" the $5 out of Tyson's hand. The complaining witness Banks testified that defendant Palmer "puts a gun in my ribs and he takes my watch and five dollars and draws over on Pico. She (appellant) was driving. * * * She asked how much money I had. I told her I didn't have but five dollars * * * the fellow asked did I want to pawn my watch * * *. I told him I didn't want to pawn it, to pawn my watch, so then he got out of the car * * * and we gets out too. * * * that is when he put the gun in my ribs." Said witness also testified that after defendant Palmer took his watch, he jumped in the car and drove off; that appellant was "under the steering wheel". Tyson testified that he surrendered the $5 because he was afraid of Palmer's gun. While Palmer was taking the watch and the money from the two sailors beside the Buick on 27th Street near Central Avenue, appellant was sitting behind the steering wheel watching Palmer and "told him to hurry up, called his name, and told him to hurry up, to make it snappy." She drove off as soon as Palmer jumped into the car with the loot taken from the two boys. Banks left his pea jacket in the car with his name stenciled on the inside. This jacket was later recovered from appellant's automobile by the police. The two sailors returned to the service station at 9th and Central where they obtained the license number of appellant's car from the attendant Moore, who corroborated this fact, among others, and who also identified appellant as the person who took Tyson and Banks into her car.

Officer Collins apprehended appellant and Palmer when they drove up to the former's home around 8 that morning, and although he searched Palmer and the car, no gun was found, nor was it found on the person of appellant. However, he did find inside the car the sailor's pea jacket with the name J. E. Banks stenciled thereon. At the time of the arrest Officer Collins conversed with appellant and Palmer, who at first denied that any sailors had been in the car at the time in question. Palmer later admitted they picked up two sailors and appellant claimed the pea jacket found in her car belonged to a friend named "Bennie Barnes". When accused, both appellant and Palmer denied having robbed any one.

Appellant took the stand in her own defense and testified that while at the service station having the battery of her car changed, she sat behind the steering wheel with defendant Palmer seated beside her, and she noticed a group of sailors standing on the corner of Central Avenue and 9th Street; that neither she nor Palmer left the Buick while at the service station, nor did she call to any of the sailors; that four or five sailors, including Tyson and Banks, walked up to the car and asked for a ride to Long Beach; that she told them she would take them because she was doing nothing but riding about; that whereupon Banks and Tyson entered the back seat of the Buick and a third sailor, who was later identified as Louis Jordan, jumped into the front seat; that after the battery was changed, she gave her name, address and the license number of her car to the attendant and immediately drove the car from the station; that in the front seat, said witness was driving the car, Palmer sat beside her and Louis Jordan sat next the window; while Tyson and Banks sat in the back seat; that such seating arrangement was not changed thereafter; that upon leaving the station, she drove south on Central Avenue, and remarked that it was getting cold and that she would stop at her home for a coat and a drink to warm her up, at which time one of the sailors offered to get her a drink if she would get them some white girls and some marihuana; that Palmer did not participate in this conversation. The witness then testified that she objected to this conversation and stopped the Buick at 27th and Central and asked Banks and Tyson to leave the car; that they complied with her wishes, cursing as they went; that the sailor in the front seat got out of the car and pushed the front seat of the sedanette over to let Tyson and Banks out; that Palmer did not leave the car not did he speak to Tyson or Banks; that the entire ride from 9th Street to 27th Street along Central Avenue took no more than twelve minutes; that the sailor Jordan returned to the Buick after the other two boys departed; that she, defendant Palmer and Jordan drove to the Avalon Drive-In where some whiskey was bought; that from there they went to appellant's house where they met her friend, Georgia Graves, and had some drinks; half an hour later appellant, accompanied by Palmer, drove Jordan to his hotel at 41st & Central; that said witness and Palmer drove to the Avalon Shoe Shine Parlor where they remained for thirty minutes before returning to the witness' home, where they were met by the police and informed they were wanted for the robbery of two sailors.

Appellant further testified that Tyson and Banks never told her how much money they had; that she never asked them how much money they had and that she knew nothing about either Tyson or Banks being robbed. At the time of her arrest, she did not tell the police that a third sailor had been in the car, nor that Tyson and Banks had mentioned marihuana and white women. She explained that she had not mentioned these things because she was not asked about them. In fact, appellant first told the police that no sailors had been in her car, and when Officer Collins found the jacket belonging to Banks, she stated that it belonged to a friend of hers, named "Benny Barney".

The complaining witness, Tyson, declared that he and Banks were the only sailors in appellant's car during the time in question; that appellant tried to interest him and Banks in some women, but the sailors refused; that no angry words passed between any of the occupants of the car nor did a dispute occur; neither was there any drinking or swearing in the car. Banks and Tyson testified that they did not drink at all during the night of November 23d and the morning of November 24, 1945; that appellant and Palmer had been drinking but there was no liquor in the car. In rebuttal the witness Tyson testified that at no time did appellant state she would have to get either a drink or her coat and at no time did either he or Banks offer appellant a drink if she would furnish them with two sticks of marihuana and some white girls. Tyson denied that he knew what marihuana was or what it was used for; that to his knowledge Banks had not been drinking, nor did Banks stagger, nor did the witness smell any liquor on Banks; that he, himself, did not drink at all.

Appellant contends that "there is not one bit of evidence in the record to show that she perpetrated the crime of robbery as to either of the complaining witnesses"; and also that the evidence is insufficient to sustain her conviction as an "aider and abettor."

In the case of People v. Wilson, 93 Cal. App. 632, 636, 269 P. 951, 952, where the facts were somewhat similar to those in this case, the court said: "Section 31 of the Penal Code declares in part that all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, are principals in any crime so committed; and the contention appellant makes regarding the evidence is that, even assuming that she was present at the time and place of the robbery, there was no proof introduced to establish the fact that she aided and abetted in the commission of the crime. We are unable to agree with this contention, for it is well settled that the question of whether or not a person who is shown to have been present at the time and place of the commission of a crime has aided and abetted therein is one of fact for the jury to decide from all the circumstances proved (People v. Woodward, 45 Cal. 293, 13 Am.Rep. 176; People v. Kauffman, 152 Cal. 331, 92 P. 861; People v. Wilson, 135 Cal. 331, 67 P. 322); and in our opinion the circumstances hereinabove narrated are legally sufficient to warrant the conclusion that appellant had previous knowledge of what was about to transpire, and that her object in being present was to divert any suspicion as to their purpose, or to serve as a lookout, and to give warning of the approach of anyone seeking to interfere with their enterprise, or to take charge of the automobile, keep the engine running, and to give direct aid to the men in making their escape. Any one of the purposes mentioned would be sufficient upon which to base the reasonable inference that she was aiding and abetting in the commission of the robbery." See, also, People v. Jaggers, 120 Cal.App. 733, 734, 735, 8 P.2d 206; In re Ortiz, 74 Cal.App.2d 810, 169 P.2d 664; People v. Gatlin, 75 Cal. App.2d 288, 170 P.2d 1013.

[1] As hereinbefore stated, the record reveals evidence which established that appellant called to the complaining witnesses and offered them a free ride to Long Beach; that she thereafter asked them if they would not like to have some fun before going to Long Beach, and that when they replied they did not have enough money for that purpose, she inquired how much money they had.

Further, appellant brought the car to a stop at 27th Street and Central Avenue where the robbery took place in, or near, her presence, since she remained in the automobile seated behind the steering wheel; that she watched defendant Palmer's actions and during the time he was relieving his victims of their money and watch at the point of a gun, appellant called to said Palmer by name, urging him to hurry up and make it snappy and drove off immediately upon Palmer's return to the car with his loot. This evidence was amply sufficient upon which to base an inference that appellant aided and abetted in the robbery by providing a quick getaway to avoid apprehension.

Appellant urges prejudicial error by the court in the giving of two instructions:

[2] 1. "The Court has given you instructions embodying such rules of law as may be necessary to assist you in arriving at a verdict. As to some of these instructions, their applicability depends upon the light in which you view the evidence.

"The fact that the Court has given you instructions as to particular rules of law must not be taken by you as an indication that such rules are necessarily applicable to the cause on trial, or as indicating that the Court considers them necessarily applicable. Where there is a conflict of evidence, the question as to whether a particular rule of law is applicable depends frequently and solely upon the conclusion as to what the facts are, and the jury are the sole judges of the facts.

"If any instruction is applicable only if a particular situation or state of facts exists, and if you find that no such situation or state of facts exists, then you should not take such instructions into consideration in your deliberations."

As to this instruction, appellant claims that "the jury was told in so many words that it was not necessary for them to consider certain instructions if they found they were not applicable to the facts they found to exist."

The precise instruction here complained of was given in the case of People v. Spraic, 87 Cal.App. 724, 262 P. 795. In sustaining the propriety of this instruction, this court stated, 87 Cal.App. at page 732, 262 P. at page 799: "Defendant complains of this instruction, and discusses it at considerable length, his grounds of attack being that thereby the court abdicated its function of declaring the law, repudiated all its other instructions, and left the jury to determine for themselves what constituted the law applicable to the case. We do not think the instruction is open to the criticisms thus directed at it by the defendant. It is the duty of a trial court to give instructions on proper request therefor as to the law applicable to any state of facts that may be logically deducible from any of the evidence, regardless of the weight or credibility of that evidence, which are within the sole province of the jury; and this duty the court performed in this case. But when the jury, in the exercise of their function of passing on the evidence, reject the evidence tending to prove a fact, and conclude that the fact does not exist, there is no longer any occasion for them to consider or apply to the case any instruction as to the legal effect of the existence of that fact. The instruction complained of did no more than inform them of this obvious rule, and the giving of it, although possibly superfluous, was not error." Likewise, in the instant situation, no prejudicial error resulted from the giving of this instruction.

2. The other instruction which appellant questions reads: "If in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the other, but you are to consider all the instructions and as a whole, and to regard each in the light of all the others." Appellant urges that this instructed the jury "in so many words that they were not to single out any certain instruction and ignore the other, but were to consider all the instructions as a whole."

[3] It is well settled law that "Instructions are to be considered as a whole. People v. Countryman, 115 Cal.App. 36, 300 P. 871; People v. White, 35 Cal.App.2d 61, 94 P.2d 617." People v. Black, 45 Cal.App.2d 87, 100, 113 P.2d 746, 754.

[4] It was stated by this court in People v. Zammora, 66 Cal.App.2d 166, 226, 152 P.2d 180, 210: "Appellants challenge the correctness of several instructions given to the jury, but when we remember that instructions should not be considered singly, but in their entirety (People v. Macken, 32 Cal.App.2d 31, 89 P.2d 173), we are persuaded from a reading of all of the instructions given that no substantial rights of the appellants were invaded in the exposition of the law as contained in the instructions given." An examination of all of the instructions given in the instant cause reveals that the jury was fairly and fully instructed as to the law applicable to the facts presented by the evidence and that no substantial rights of appellant were invaded thereby.

For the reasons stated, the judgment and order appealed from are, and each of them is, affirmed.

DORAN and WHITE, JJ., concur.

76 Cal.App.2d 577

O'NEAL v. KELLY PIPE CO. et al.

Civ. 15281.

District Court of Appeal, Second District,
Division 1, California.

Oct. 22, 1946.

1. Appeal and error 🔑989

When a judgment is attacked as unsupported by the evidence, the power of the appellate court begins and ends with a determination of whether there is any substantial evidence, contradicted or uncontradicted, that will support the verdict rendered.

2. Automobiles 🔑244(18)

In action for personal injuries sustained when automobile occupant was struck by steel pipe projecting from rear of truck and trailer, verdict for plaintiff was sustained by the evidence.

3. Automobiles 🔑245(23)

In action for injuries to occupant of automobile as result of collision with pipe projecting from truck and trailer, whether the pipe lights were burning and whether defendants had used ordinary care to keep them burning were for jury. Vehicle Code, §§ 618, 621, 626.

4. Automobiles 🔑107(1), 201(1)

Alleged carrying of passengers for hire without complying with rules of State Railroad Commission or of Interstate Commerce Commission or securing permits or certificates from such bodies could not have been proximate cause of injury to occupant of automobile which collided with truck and trailer without pipe lights, and was immaterial.

5. Appeal and error 🔑1056(1)

Where automobile collision occurred a short distance after automobile in which plaintiff was riding left a filling station, and the only evidence of the speed after leaving filling station was that automobile was proceeding in second gear and at a speed of 25 to 27 miles per hour, exclusion of evidence as to speed of automobile before arriving at the filling station was not prejudicial error.

6. Trial 🔑260(1)

Refusal to give requested instructions adequately covered by instructions given was not error.

7. Appeal and error 🔑1067

In action for injuries resulting from failure of truck and trailer to have pipe lights, failure of court to charge jury that, if automobile in which plaintiff was riding was so loaded or had such a number of persons in the front seat as to obstruct the view of the driver, the driver was guilty of negligence, was not prejudicial error where there was no evidence that the driver was distracted by the presence of woman passenger beside him or that driver's view was obstructed.

8. Damages 🔑132(1)

$25,000 was not excessive for a depressed comminuted fracture of cheek bone resulting in limited movement of jaw, discharge from ear and slowing up mentally and disfiguring scar on left cheek, as well as lesser scars on eyebrow and nose, of young man 22 years of age who was unconscious for week after accident and was in hospital for about 60 days.

9. Appeal and error 🔑1004(1)

The amount of damages for personal injuries is committed largely to the discretion of the jury and trial court, whose determination may not be set aside on appeal unless it appears that the award is so disproportionate to the injuries sustained as to indicate that it was the result of passion, prejudice, or corruption.

* * *

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by James D. O'Neal, Jr., against Kelly Pipe Company and James W. Lewis for injuries sustained when vehicle in which plaintiff was riding struck steel pipe which projected from the rear of truck owned by corporate defendant and operated by individual defendant. From a judgment for plaintiff for $25,000 and from an order denying their motion for judgment notwithstanding the verdict, the defendants appeal.

Judgment affirmed, and appeal from order denying motion for judgment notwithstanding the verdict dismissed.

Lyndol L. Young, of Los Angeles, for appellants.

John A. Gilligan and George H. Pratt, both of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal from a judgment in favor of plaintiff entered upon the verdict of a jury in an action for damages for personal injuries. Defendants also appeal from an order denying their motion for judgment notwithstanding the verdict.

Plaintiff's injuries were sustained when the vehicle in which he was riding struck some six-inch steel pipe which projected from the rear of a truck and trailer owned by defendant Kelly Pipe Company and operated by defendant James W. Lewis. The charge of negligence lay in the asserted carelessness of the driver in failing to have lights burning at the rear of the load of pipe. Defendants contended that the lights were burning at the time of and before the accident, or if they were not burning, such defect was not due to the negligence of the driver. Defendants further contended that the accident was unavoidable; that it was due solely to the negligence of plaintiff's father, who was driving the automobile in which plaintiff was riding; that plaintiff's father was guilty of contributory negligence and that such contributory negligence was imputed to plaintiff by reason of the fact that they were engaged in a joint venture.

Mr. O'Neal, Sr., father of plaintiff, testified that on December 11, 1944, he was driving his 1939 Chrysler sedan north on the Ridge Route about seven miles south of Bakersfield. The car was towing a trailer. Mr. O'Neal was engaged in the occupation of delivering trailers and carrying passengers obtained through a travel bureau from Los Angeles to Portland, Oregon. With him in the front seat were his son and a Mrs. Griffith, who was seated between the two men. There were also two women passengers in the rear seat and one in the trailer. Shortly before the accident, at about eight o'clock in the evening, they stopped to get gasoline and clean the windshield at a service station on the left-hand, or westerly, side of the road. The witness testified that the accident occurred after they had left the service station and had traveled about 300 feet in a northerly direction. As to the happening of the accident he testified:

"Q. What was the first indication you nad, if any of the presence of something else northbound on the highway? A. The first thing I noticed was the pipe that took the emblem off of the front of the radiator.

"Q. Just prior to the time that you noticed the end of the pipe did you see any lights on at all? A. I seen no lights or anything.

"Q. About how fast were you driving at that time? A. Well I would say approximately between 25 and 27 miles an hour. I hadn't even got out of or shifted into high. I was still in second. * * *

"Q. What happened then when you saw this pipe take off the embem on top of your radiator? A. Well, I tried to swerve the car to the left, dodge where I seen it was, and then I applied my brakes at the same time, but the two kept moving together so I hollered, * * * the pipe came through the windshield * * *

"Q. Did you see at that time immediately after the impact, did you see any lights on the back end of that dolly? A. No, sir."

The witness further testified that immediately after the accident he got out of his car, sent a man to the rear to flag traffic, and went on to the truck, which was parked 150 to 200 feet ahead of the car; that when he got there he saw the defendant truck driver "between his load of pipe and the dolly trying to connect up the wires that carried the lights back to the back end of the truck. * * * he seemed to have some trouble with his connection, where his lights connected up. * * * I said, 'This is a high time to be connecting those lights up, after you have practically killed somebody.' And he didn't say anything at first. He never mentioned anything. I said, 'You are working frantically to get them burning before the police arrive.'

"Q. All right. What did he say? A. Well, he never said much of anything that I remember, at all."

Mrs. Griffith, who was riding in the front seat between plaintiff and his father, testified that "the fog was quite dense at the scene of the crash and suddenly a dark object loomed up in front of us" at an estimated distance of 20 feet; that she saw no lights of any kind.

Mrs. Butler, who lived in an auto court on the west side of the highway, testified that she heard the crash, and from her door saw the Chrysler automobile 150 to 200 feet up the road to the north; that she could see a taillight on the trailer hauled by the automobile; that she reached the scene of the accident about two minutes after the crash and then returned to the house to call an ambulance; that while at the scene of the accident she looked to the north and saw no taillights; that she did not see any one who identified himself as the driver of the truck; that at the scene she saw only a man and a woman in addition to the injured man. She also testified that the filling station operated in connection with the auto court closed at around seven o'clock in the evening (the accident occurred at 8 p.m. or later); that there was another filling station about a half-mile further south, but she did not know whether it was open at the time of the accident.

The defendant driver testified that the truck itself was equipped with six rear lights; that the bed of the trailer was similarly equipped; that the light circuit of the trailer or "dolly" upon which the load of pipe was carried was connected to the truck lighting system by a plug and socket; that about fifty miles from the scene of the accident he attached four red lights (connected to the "dolly" system by plug and socket) to the rear end of the load of pipe; that these lights were held in place on the pipe by clamps and bolts; that he inspected them and saw that they were burning properly. The pipe being hauled was 50 feet long and projected to the rear of the "dolly" 16 to 18 feet. He also inspected the lights about ten miles from the scene of the accident when he stopped to cool his motor. He further testified that upon feeling the impact, which drove one pipe forward six or eight feet past the cab, he brought the truck to a stop and with his flashlight ran back south of the Chrysler to flag traffic; that he did not stop at the Chrysler or talk to any one. He testified that his lights were on when he got out of the truck and denied in toto the testimony of Mr. O'Neal, Sr., as to his attempting to fix the lights before the officers arrived. Defendant Lewis further testified that the lights on the pipe were so constructed as to project a white beam on the pavement which he could see through his left rear-view mirror; that prior to the impact he had been driving with his head in the left-hand window and had observed, not more than two minutes before the accident, that the "pipe lights" were on.

[1, 2] Appellants urge that the evidence is insufficient to support the verdict and judgment, upon the grounds (1) that the sole proximate cause of the accident was the negligence of Mr. O'Neal, Sr., driver of the Chrysler automobile; (2) that plaintiff was guilty of contributory negligence; and (3) that "there is no substantial or credible evidence" of negligence on the part of defendants. The arguments of appellants in this regard, however, cannot prevail against the firmly grounded rule that when a judgment is attacked as being unsupported by the evidence, the power of an appellate court begins and ends with a determination as to whether or not there is any substantial evidence, contradicted or uncontradicted, which will support the verdict rendered by the jury. Arundel v. Turk, 16 Cal.App.2d 293, 295, 60 P.2d 486; Crawford v. Southern Pac. Co., 3 Cal.2d 427, 45 P.2d 183.

Appellants refer to the testimony of O'Neal, Sr., that the impact occurred two or three hundred feet down the road from the gasoline station, and therefrom argue that had O'Neal, Sr., looked as he pulled out or prepared to pull out of the station into the highway he would have seen the truck as it passed the station. Appellants also contend that the "undisputed" evidence shows that the headlights were not burning on the Chrysler automobile. Contributory negligence on the part of plaintiff is predicated upon his asserted failure to look for approaching vehicles as the car entered the highway from the station and his failure to warn his father that the lights were not burning on the Chrysler. The answer to these contentions is that they are factual and the jury by its verdict found against them. The distance from the station to the point of the accident and the speed of the respective vehicles were matters of estimate by the witnesses. Obviously the truck had already passed when the Chrysler entered the highway. The contention that the lights of the Chrysler were not burning is based solely on the testimony of the defendant truck driver that he did not see the lights of the Chrysler as it came up behind him. At another point in his testimony, however, he stated that he had looked in his rear-view mirror "within a couple of minutes" before the accident occurred, but that he was not looking in the mirror at the moment of the impact. There is therefore no foundation for appellants' claim that the "undisputed" evidence showed that the Chrysler lights were not burning. The attempt to predicate negligence as a matter of law upon the fact that there were no brakes upon the trailer hauled by the Chrysler automobile cannot be sustained, because the evidence would warrant the conclusion either that the speed of the Chrysler was not in excess of the limit prescribed in such a situation or that the condition of the brakes was not the proximate cause of the accident. Other contentions of appellants as to the effect of the evidence are subject to similar infirmities. No useful purpose would be served by further discussion of appellants' contentions with respect to the effect or value of the evidence. The testimony as to the main question, whether the lights were burning on the pipe, was in direct conflict. This conflict was resolved against defendants by the verdict of the jury.

[3] Appellants next assert that there is no substantial or credible evidence to show negligence upon their part, and in support thereof argue, in effect, that the jury was bound to believe the testimony of Lewis, the driver, that the lights were in good order when he first turned them on, still in good order when he stopped to cool his motor ten miles from the scene of the accident, and were still burning when he checked them through his rear-view mirror about two minutes before the accident took place. It must also be conceded that the lights were burning when they were inspected by highway patrol officers who came on the scene in response to a radio call a few minutes after the accident. From this it is argued that the undisputed evidence shows that the defendant driver exercised due care to see that the lights were burning; that the liability of defendants is based not upon the asserted fact that the lights were out, but upon their failure to use due care to keep them burning. From this premise appellants proceed to devote several pages of their brief to the weaknesses in plaintiff's evidence and the strength of the defendants', as to the disputed question of whether the pipe lights were burning. Further, in effect, appellants would have this court hold that defendant Lewis' testimony must be accepted as true, because it was "clear, positive [and] uncontradicted." Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868, 870. It must be held, however, that there was sufficient substantial evidence to go to the jury on the question of whether the lights were burning, and in such a situation, the further question of the sufficiency of defendants' proof that ordinary care was used to keep them burning was likewise a question of fact for the jury. Ellison v. Lang Transportation Co., 12 Cal.2d 355, 358, 84 P.2d 510; Brooks v. Bailey, 40 Cal.App.2d 310, 315, 104 P.2d 854; Takahashi v. White Truck, etc., Co., 15 Cal.App.2d 107, 109, 59 P.2d 161, 162. As was said by this court in the last-cited case, "There was evidence sufficient to require the decision of the jury upon the alleged violation of sections 99, 106 of the California Vehicle Act * * * and § 110 * * * (now sections 618, 621, and 626 of the Vehicle Code, St.1935, pp. 93, 201, 202, 205), under which the trailer was required to carry a red taillight and red load lights on the trailer load. The failure to have such lights showing would have constituted prima facie evidence of negligence. If they were not showing at the time of the accident, the sufficiency of the defendant's proof that it had exercised ordinary care to keep them lighted presented a question of fact for the decision of the jury." Negative testimony as to the absence of lights has not infrequently been held sufficient to sustain findings of negli-

gence on the part of automobile drivers. Takahashi v. White Truck Co., supra, citing Carswell v. Pacific Greyhound Lines, Inc., 7 Cal.App.2d 466, 46 P.2d 297; and Grimes v. Richfield Oil Co., 106 Cal.App. 416, 289 P. 245.

[4] Appellants' next attack is directed to the alleged unlawful activities of O'Neal, Sr., in carrying passengers for hire without complying with the rules of the California Railroad Commission or the Interstate Commerce Commission, or securing whatever permits or certificates may be required by those bodies. It is a sufficient answer to this question to point out that neither the failure to secure a permit or certificate nor the absence of brakes on the trailer, nor the fact that a trailer was being hauled, nor the presence of Mrs. Griffith in the front seat (all asserted by appellants to constitute violations of the law relating to common carriers) could under any reasonable view of the evidence be considered the proximate cause of the accident or as having any causal connection therewith.

[5] Prejudicial error cannot be based on the trial court's refusal to admit evidence as to the speed the Chrysler automobile had been driven from Los Angeles to the filling station where the testimony shows respondent's father stopped the car to obtain gasoline and clean the windshield. The accident occurred a short distance from the filling station, and the only evidence in the record as to the speed of the automobile after leaving the filling station was that it was proceeding in second gear and at a speed of approximately 25 to 27 miles per hour. It was the speed of the automobile just before and at the time of the accident that was material. At what rate of speed respondent's father drove from Los Angeles to the filling station where he stopped was immaterial in determining the ultimate issue involved.

[6, 7] It is next asserted that the trial court erred in refusing certain instructions proffered by the defendants. The first of these, to the effect that defendants were not liable even though the lights were not burning, if they used ordinary care in the inspection and maintenance of the equipment, was adequately covered by an instruction which was given, the only substantial difference being that defendants' proffered instruction included a statement that machinery or equipment created by the human mind and hand sometimes fails to operate or becomes defective. Defendants' proffered instruction also included a discussion of the care required of the driver of the Chrysler. This was covered in other instructions. The complaint that the court failed to give requested instructions on defendant's theory of the case is without merit. The instructions given adequately covered the issues framed by the pleadings and presented by the evidence. No prejudicial error can be predicated upon the failure of the court to instruct the jury that if the Chrysler automobile was so loaded or had such a number of persons in the front seat as to obstruct the view of the driver, then the driver was guilty of negligence as a matter of law. The argument that the driver was "distracted" by the presence of Mrs. Griffith in the front seat or that her presence obstructed his view straight ahead finds no support in the evidence.

[8, 9] Appellants contend, finally, that the award of $25,000 is excessive, pointing out that no special damages, hospital expenses or medical expenses, were proved; that plaintiff had held but one job prior to his injury, repairing tires at $40 per week; and that no showing was made of impaired earning power. While the verdict is large, it cannot be said to be so disproportionate to the injuries received as to indicate that it was the result of passion, prejudice or corruption on the part of the jury. Formosa v. Yellow Cab Co., 31 Cal.App.2d 77, 87 P.2d 716. Photographs in evidence show that respondent has been left with an ugly, disfiguring scar on his left cheek where he was struck by the six-inch pipe, as well as lesser scars on his eyebrow and nose. He was unconscious for a week in the hospital, where he remained 59 or 60 days. His jaws were wired together for 45 days. There was a discharge from his right ear, and at the time of the trial his jaw was still numb and could not be opened fully. The only medical testimony was that of a physician who examined respondent shortly before the

trial and took X-rays. He testified that respondent suffered a depressed comminuted fracture of the cheek bone, and from the history of the case must probably a basal skull fracture; that the limited movement of the jaw would not improve without further surgery. There was testimony that respondent was markedly slower mentally since the accident. In addition to the foregoing elements of pain and suffering and the effect of the disfigurement upon a young man of the age of respondent—22 years—there must be taken into consideration the fact that the trial judge, who like the members of the jury had an opportunity to observe the respondent's facial condition, declined upon motion for new trial to modify the award. The question of the amount of damages being committed largely to the discretion of the jury and trial court, their determination of the question may not be set aside on appeal unless it appears that the award is so disproportionate to the injuries sustained as to indicate that it was the result of passion, prejudice or corruption on the part of the triers of fact. Such is not the case here.

The attempted appeal from the order denying defendants' motion for judgment notwithstanding the verdict of the jury is dismissed. The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

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76 Cal.App.2d 614

BENWELL v. LOWERY, County Auditor, et al.

Civ. 15316.

District Court of Appeal, Second District, Division 3, California.

Oct. 28, 1946.

Rehearing Denied Nov. 15, 1946.

Hearing Denied Dec. 23, 1946.

1. Officers 🔑95

Performance of the duties of the office, without being a holder of a valid commission of office, does not give a party the right to the salary of the office.

2. Officers 🔑94

The intent of statute relating to payment of salary of a public office pending contest was to allow the payment thereof only to the incumbent who possesses such legal evidence of title to the office as is furnished by a certificate of election or commission of office, and when the certificate once held by him has been finally rendered void it no longer constitutes such evidence. Government Code, §§ 1130–1132.

3. Justices of the peace 🔑15

Where plaintiff's right to the office of justice of the peace was determined in his favor in quo warranto proceeding, and the commission of office given to his alleged successor was nullified by the determination that appointment of such successor was invalid, plaintiff and not the alleged successor was entitled to the salary of the office during the period of the pendency of quo warranto proceedings. Government Code, §§ 1130–1132.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action in mandamus by Leon Benwell against J. M. Lowery, Auditor of the County of Los Angeles, and another, to establish plaintiff's right to receive the salary of a justice of the peace of Signal Hill township. Judgment for plaintiff, and defendants appeal.

Affirmed.

Harold W. Kennedy, Co. Counsel, and S. V. O. Prichard, First Asst. Co. Counsel, both of Los Angeles, for appellants.

Albert D. White and Joseph A. Ball, both of Long Beach, for respondent.

SHINN, Justice.

This is a proceeding in mandamus to establish plaintiff's right to receive the salary of a justice of the peace of Signal Hill Township in Los Angeles County, and to compel the defendant Lowery, as Auditor, to draw warrants in his favor for such salary for the months of August, 1944, to September, 1945, inclusive. Plaintiff had judgment and defendants have appealed.

Judgment was rendered upon the pleadings, from which the following facts appear: plaintiff was elected justice of the peace of the township August 25, 1942, for a term of four years, commencing January 4, 1943; he received a certificate of election, and entered upon the discharge of his official duties January 4, 1943. On August 29, 1944, the board of supervisors adopted a resolution declaring vacant the office of justice of the peace of said township by reason of the absence of plaintiff from the State of California from August 2, 1944, to September 5, 1944, not on official business, and without the consent of the board of supervisors, and at the same time the board appointed Stanley A. Foutz as justice of the peace of said township. A commission of office was issued to said Foutz and he entered upon and discharged the duties of said office from on or about August 29, 1944, to September 30, 1945. On or about September 11, 1944, said board caused the locks on the court room and chambers doors to be changed and plaintiff was prevented from carrying on and performing his duties as justice of the peace until the 30th of September, 1945. On October 17, 1944, a quo warranto proceeding was instituted, upon relation of Benwell, against Foutz and a judgment was entered therein declaring Benwell to be the justice of the peace of said township; that Foutz was guilty of usurping and unlawfully holding said office, and ousting and excluding him from the same. This judgment was affirmed on appeal September 25, 1945 (People ex rel. Benwell v. Foutz, 27 Cal.2d 1, 162 P.2d 1), and Foutz then surrendered the office to Benwell, who entered upon and has since performed the duties thereof.

Defendant Lowery has drawn warrants in favor of Foutz for the monthly salary from August, 1944, to and including September, 1945, although the same have not been delivered, and he refuses to draw warrants in favor of plaintiff covering the salary for the same months. In the instant proceeding both defendants assert the claim of Foutz to receive the salary.

[1] Defendants concede that plaintiff is entitled to the salary of the office, except during the period of the pendency of the quo warranto proceedings, namely, October 17, 1944, to September 25, 1945, but they contend that Foutz was entitled to the salary during that period. They rely upon sections 1130, 1131, and 1132 of the Government Code, which were taken from sections 936 and 937 of the Political Code. Original section 936 read as follows: "When the title of the incumbent of any office in this state is contested by proceedings instituted in any court for that purpose, no warrant can thereafter be drawn or paid for any part of his salary until such proceedings have been finally determined." In 1891 the section was amended by adding: "Provided, however, that this section shall not be construed to apply to any party to a contest or proceeding now pending or hereafter instituted who holds a certificate of election or commission of office and discharges the duties of the office; but such party shall receive the salary of such office, the same as if no such contest or proceeding was pending." With slight grammatical alterations, section 1130 of the Government Code is the same as original section 936 of the Political Code, and section 1132 of the Government Code embodies the 1891 amendment to said section 936. Merkley v. Williams, 3 Cal.App. 268, 84 P. 1015, Tout v. Blair, 3 Cal.App. 180, 84 P. 671, and Chubbuck v. Wilson, 151 Cal. 162, 90 P. 524, 12 Ann.Cas. 888, cited by defendants, were typical cases of the proper application of section 936, as amended. In each case the board of supervisors had erroneously canvassed the votes, in one case for tax collector, in another for supervisor, and in the third case for sheriff, and had issued certificates of election to the supposed victors, who thereupon took and held the respective offices. In each case a contest had been instituted and the contestant had been successful, but the temporary incumbent was awarded the salary during the pendency of the contest. Defendants say that Benwell is in the same position as the respective contestants in the three cases cited, that Foutz is in the same position as the candidates in those cases, who, although they had lost the elections, had been issued certificates of election and had performed the duties of their respective offices during the pendency of the contests, and

they contend that the cited cases are therefore controlling. Foutz, they say, held a commission of office, performed the duties of the office, and therefore is entitled to the salary. We could concur in this view if Foutz had been issued a commission of office within the purview of section 1132 of the Government Code. Performance of the duties of the office, without being the holder of a valid commission, would not have given him a right to the salary. Bledsoe v. Colgan, 138 Cal. 34, 70 P. 924. Section 1130 of the Government Code is but a statement of the established principle that the right to receive the salary is an incident which attaches to the legal right to an office. Ward v. Marshall, 96 Cal. 155, 159, 30 P. 1113, 31 Am.St.Rep. 198; People ex rel. Culbertson v. Potter, 63 Cal. 127. Section 1132, Government Code, states an exception to the rule. The certificate of election or commission upon which the right to salary rests must, of course, be a valid one.

[2] In Wilson v. Fisher, 148 Cal. 13, 82 P. 421, Wilson sued to recover his salary as superintendent of schools, for which office he held a certificate of election pursuant to declaration of the board of supervisors, following their canvass of the votes. In an election contest one McCarthy was declared to have been elected and Wilson appealed more than ten days after the judgment was rendered. Section 1127 of the Code of Civil Procedure then read: "Whenever an election is annulled, or set aside by a judgment of the superior court, and no appeal has been taken within ten days thereafter, the commission, if any has issued, is void, and the office vacant." In rejecting Wilson's claim to the salary, the court said, 148 Cal. p. 17, 82 P. 421, 422: "To entitle him to salary during the pendency of a contest involving his title to the office, the incumbent must bring himself within this exception to the general rule declared by the section [amended section 936, Political Code]; in other words, he must not only be the incumbent discharging the duties of the office, but he must also hold the certificate of election or commission of office. Bledsoe v. Colgan, 138 Cal. 34, 70 P. 924. This means, of course, a certificate of election or commission of office that is in force, and not one that has been irrevocably nullified. One cannot be said to hold the certificate of election or commission of office, where the effect of a judgment of the superior court has been to finally render what was originally such a certificate or commission of no further legal force or effect. The plain intent of section 936, Pol.Code, was to allow the payment of salary pending contest only to the incumbent who possesses such legal evidence of title to the office as is furnished by a certificate of election or commission of office, and, when the certificate once held by him has been finally rendered void, it no longer constitutes such evidence."

The board of supervisors, in declaring plaintiff's office vacant, acted pursuant to the provisions of sections 1063 and 1770 of the Government Code, Stats.1943, pp. 956, 969. The former section provides that a township officer may not absent himself from the state for more than five days, except upon business of the state, county or township, or with the consent of the board of supervisors, and the latter section provides that absence under the forbidden conditions causes a forfeiture of the office and a vacancy therein. In People ex rel. Benwell v. Foutz, supra, the court declined to give effect to these sections of the Government Code, for the reason that they are in conflict with the provisions of section 9, Article VI of the Constitution, insofar as they relate to judicial officers. The conflict arises from the fact that section 9 forbids the legislature to grant leaves of absence to judicial officers and provides that absence from the state of such officers for sixty consecutive days results in forfeiture of office. It is only restating the holding of the court to say that the action of the board in attempting to appoint Foutz to a vacancy which did not exist was without legal authority and void.

[3] Merkley v. Williams and the other two cases first herein cited are not in point. The certificates of election there involved, although they had been issued erroneously, were valid until their invalidity had been established through a determination that they had been issued in error. They were certificates of election within the purview of amended section 936 of the Political Code

and section 1132 of the Government Code, for if it had not been contemplated that erroneous certificates of election might be issued, there would have been no occasion for the amendment of section 936. But in plaintiff's case the situation is different. He has been at all times the legal holder of the office and entitled to occupy it; Foutz was a mere intruder. The commission which Foutz held was worthless so far as the present controversy is concerned, for the board had no power to appoint him to an office which was then held by Benwell. Holding nothing which can be regarded as a commission of office within the meaning of section 1132 of the Government Code, Foutz is not entitled to the salary and Benwell gets it.

The judgment is affirmed.

DESMOND, P. J., and KINCAID, Justice pro tem., concur.

Hearing denied; SHENK and SCHAUER, JJ., dissenting.

76 Cal.App.2d 673

In re Haines' Estate.

Civ. 7273. Sac. 5773.

District Court of Appeal, Third District, California.

Oct. 30, 1946.

1. Wills ⚿858(1)

Where will executed within 30 days of death of testatrix, leaving surviving heirs within third degree of consanguinity who were not made beneficiaries under substitutional or residuary bequest, bequeathed residuary estate to charity and provided by substitutional residuary clause for distribution of residuary estate to named non-relative should bequest to charity be invalid, surviving heirs were precluded from participating either as legatees or heirs in distribution of residuary estate. Probate Code, § 41.

2. Wills ⚿13(3)

Bequest of residuary estate to charity was valid, though will was executed within 30 days of death of testatrix leaving surviving heirs within third degree of consanguinity, where under substitutional residuary clause, residuary estate must be distributed to a non-relative should bequest to charity be held invalid. Probate Code, § 41.

3. Wills ⚿13(3)

A testamentary gift to charity is valid, though made within 30 days of testator's death, but may be avoided at instance of an heir of designated class who would have been entitled to take the property had it not been willed to charity. Probate Code, § 41.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Proceeding in the matter of the estate of Mayme K. Haines, deceased, on the petition of the Capital National Bank, as executor, for settlement of the final account and for distribution. From a final decree of distribution in favor of Eleanor Mott, William J. Rogers and others, as heirs, appeal.

Decree reversed with directions.

Busick & Busick, and Charles O. Busick, all of Sacramento, for appellants.

Joseph W. Mento, Frank F. Atkinson, White & Harber, and Lawrence A. Schei, all of Sacramento, for respondents.

PEEK, Justice.

Mayme K. Haines died testate in the County of Sacramento on August 13, 1944. On July 31, 1944, within 30 days of her death, she executed a will which contained, among others, the following provisions:

"Sixth: All the rest, residue and remainder of the property and estate which I may own, or in which I may have any interest, at the time of my death, including lapsed bequests, I give and bequeath to the Eastern Star Lodge No. 183, Marion, Iowa, to be by said Lodge used for the benefit of the Eastern Star Masonic Home at Boon, Iowa, said fund to be ad ministered by the Board of Directors of said Eastern Star Lodge No. 193.

"Seventh: I have purposely made no provision for my half brother, W. J. Rogers, of West Union, Iowa, or for any other person, whether claiming to be an heir of mine or not, and if any person, whether a beneficiary under this Will or not mentioned herein, shall contest this Will or object to any of the provisions hereof, I give to such person so contesting or objecting the sum of Ten Dollars ($10.00) and no more in lieu of the provisions which I might have made or which I have made herein for such person so contesting or objecting.

"Eighth: If the disposition of the residue of my estate, or any portion thereof, to the Eastern Star Lodge No. 183, as hereinabove provided, shall be held to be in violation of Section 41 of the Probate Code of the State of California then I direct that such disposition to the extent that the same is valid and legal shall remain in full force and effect. Any portion of my estate which shall be held to have been disposed of in violation of Section 41 of the Probate Code shall be distributed to my friend, Eleanor Mott. However, in no event and under no circumstances shall any part of my estate go to my half-brother W. J. Rogers."

By another paragraph (Fifth), all the personal effects of the testatrix and a legacy of $500 were bequeathed to the said Eleanor Mott.

At the time of her death, there were left surviving the decedent six nephews and nieces (children of her brothers and sisters), her half-brother William J. Rogers (since deceased), and a friend Eleanor Mott.

After a hearing on the petition of the executor for a settlement of the final account and for distribution, the probate court made and entered a final decree of distribution, determining that "Eastern Star Lodge No. 183 of Marion, Iowa, is a charitable or benevolent society or corporation; that the disposition of the residue of the estate of testatrix to said Eastern Star Lodge No. 183 of Marion, Iowa, is in violation of Section 41 of the Probate Code of the State of California", and further decreeing that "there is hereby distributed to Eleanor Mott the following property of said decedent, to wit: * * * Third: All of the rest, residue and remainder of the property and estate of said decedent which consists of the sum of $2,196.17 in cash, together with any other property not now known or discovered which said decedent may have been the owner of during her lifetime, or which her estate has acquired an interest in since her death."

It is from said paragraph third of the decree that the six nephews and nieces and the personal representative of the deceased half-brother's estate prosecute this appeal.

The question presented is the validity and effect under Section 41 of the Probate Code of a testamentary gift to charity of a portion of the decedent's estate, where the decedent dies within 30 days after executing the will, leaving surviving heirs within the third degree of consanguinity, and the will contains a substitutional residuary clause which would have required distribution of the property in question to a nonrelative if the gift to charity had not been made.

Probate Code, § 41, as amended by statutes of 1943, page 1296, chapter 305, provides:

"No estate, real or personal, may be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, by a testator who leaves a spouse, brother, sister, nephew, niece, descendant or ancestor surviving him, who, under the will, or the laws of succession, would otherwise have taken the property so bequeathed or devised, unless the will was duly executed at least 30 days before the death of the testator.

"If so executed at least 30 days before death, such devises and legacies shall be valid, but they may not collectively exceed one-third of the testator's estate as against his spouse, brother, sister, nephew, niece, descendant or ancestor, who would otherwise, as aforesaid, have taken the excess over one-third, and if they do, a pro rata deduction from such devises and legacies shall be made so as to reduce the aggregate thereof to one-third of the estate. All property bequeathed or devised contrary to the provisions of this section shall go to the spouse, brother, sister, nephew, niece, descendant or ancestor of the testator, if and to the extent that they would have taken said property as aforesaid but for such devises or legacies; otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected.

"Nothing herein contained is intended to, or shall be deemed or construed to vest any property devised or bequeathed to charity or in trust for a charitable use, in any person who is not a relative of the testator belonging to one of the classes mentioned herein, or in any such relative, unless and then only to the extent that such relative takes the same under a substitutional or residuary bequest or devise in the will or under the laws of succession because of the absence of other effective disposition in the will."

The sole question posed in the present case appears definitely to have been answered in the case of Estate of Davis, 74 Cal.App.2d 357, 168 P.2d 789, decided by Division Two of the Second District Court of Appeal on May 14, 1946, in which a hearing was denied by the Supreme Court. The factual situations in the two cases bear a remarkable similarity—so much so that the respondent herein, Eleanor Mott, filed an appearance therein as a friend of the court and urged the same arguments as those she has advanced before this court in support of the order of the trial court herein decreeing distribution of the residue of the estate to her.

In the Davis case the decedent, who was survived by a sister and nephews and nieces, executed a will approximately three months prior to his death. Said will contained provisions wherein certain designated charities were given the residue of the estate, and, if for any reason any of said charities were unable to take, the residue was to be pro-rated among the charities that could take, or, if under sections 41 to 43 of the Probate Code there should be some portion of the estate which could not be distributed as above provided, then his executor was directed to distribute the same to certain named individuals.

The executor filed a petition for the construction of the will and instructions to determine who was entitled to the distribution of the residuary estate. The probate judge held that the bequests of the residuary estate to the charitable institutions named in the will were valid and that said estate should be distributed to them.

From such order an appeal was taken. The appellants urged that, because of the limitation as to time contained in section 41 of the Probate Code, the portion of the residuary estate devised and bequeathed to charity which exceeded one-third in value of the distributable estate should be distributed to those certain charities alternatively named in the will which were competent to take under the law. The appellate court held this proposition to be untenable, and further held that the probate court properly ordered distribution to the charities named as primary residuary devisees and legatees, in accordance with the terms of the will.

In discussing the reasoning by which this conclusion was reached, the court explained that the relatives of Davis could not take in any event, inasmuch as they were not named in the will as beneficiaries under any substitutional or residuary bequest or devise and they could not inherit under the laws of succession because "there is no lack of effective disposition in the will of the portion of the estate represented by the charitable gifts in excess of one third of the estate." 74 Cal.App.2d 357, 168 P.2d 789, 792.

Additionally the court concluded that if the gifts to charity in excess of one-third of the estate were voidable under section 41, such portion would go to the named individuals under the substitutional clause, and that, therefore, there was no intestacy, the relatives were precluded from taking, and "the testamentary dispositions are valid and enforceable and the order of the probate court so construing the will is proper." 74 Cal.App.2d 357, 168 P.2d 789, 793.

To paraphrase the language of the opinion in the Davis case and apply the same to the present one we may state our conclusion as follows:

Under the will of Mayme K. Haines, her nephews and nieces are not made beneficiaries under any substitutional or residuary bequest or devise and they cannot inherit under the laws of succession because there is no lack of effective disposition in the will of the portion of the estate represented by the charitable gift.

If the gift to charity made within 30 days of the death of the testatrix was voidable under section 41 of the Probate Code, the portion of the estate represented thereby would go to Eleanor Mott under the substitutional clause of paragraph Eighth. There is thus no intestacy as to said portion of the estate. The substitutional gift to Eleanor Mott is clearly noncharitable, and creates no trust. Hence the nephews and nieces are excluded from participation either as legatees, devisees or heirs.

[1] Therefore the conclusion herein must be that the only relatives of the prescribed classes surviving Mayme K. Haines are precluded by law and by the terms of the will from participating in any distribution of that portion of the estate bequeathed or devised to charity.

[2] It necessarily follows that the testamentary disposition to Eastern Star Lodge No. 183 is valid and enforceable and the decree of the probate court should so provide.

The circumstance that the case at bar deals with a charitable gift made within 30 days of death, as conditionally prohibited by the first sentence of section 41, whereas the Davis case dealt with an excessive charitable gift made more than thirty days prior to death, as conditionally prohibited by the second sentence of said section, appears to be immaterial in view of the fact that by the general language of the next succeeding sentences of the section gifts of either kind not expressly prohibited are in effect declared to be valid.

It is apparent that the 1943 amendment of section 41 has served to clarify the legislative intent. Not only does it emphasize the rule that a gift to charitable uses is voidable only if the heir would "otherwise" have taken, as explained in the majority opinion in Estate of Broad, 1942, 20 Cal. 2d 612, 128 P.2d. 1 (see Estate of Fleishman, 62 Cal.App.2d 588, 145 P.2d 86; 31 Cal.Law.Rev., pp. 118-120; 17 So.Cal.Law Rev., pp. 145-146), but it also serves to accomplish the result deemed desirable by Mr. Justice Traynor in his dissenting opinion in the Broad case, to wit, that a residuary gift in favor of the heir will defeat intestacy.

[3] Accordingly, it may be stated that generally speaking a testamentary gift to charity is valid, even though made within 30 days of the testator's death; however, such a gift may nevertheless be avoided at the instance of an aggrieved heir of a designated class; but such heir is not aggrieved unless he would have been entitled to take the property had it not been willed to charity, as in a case where the will contains an alternative disposition to one other than the heir.

While our determination herein is such as to preclude appellants from prevailing upon their appeal, it does not follow that a correct disposition of the case would be obtained by affirming the decree below, which distributes the estate in question to respondent Eleanor Mott instead of respondent Eastern Star Lodge No. 183. See Edlund v. Superior Court of City and County of San Francisco, 209 Cal. 690, 695, 289 P. 841. Therefore the judgment is reversed with directions that a decree be entered in accordance with the opinion herein.

ADAMS, P. J., and THOMPSON, J., concur.

SCHUBERT et al. v. BATES. *

Civ. 15414.

District Court of Appeal, Second District, Division 1, California.

Oct. 29, 1946.

Hearing Granted Dec. 23, 1946.

Courts ⟹190(9)

Where landlords brought action in unlawful detainer against tenant and obtained an order of restitution from municipal court, and tenant, though not compelled to do so, moved from leased premises, and thereafter tenant appealed and judgment was reversed and cause was remanded for new trial, and landlords then dismissed the action, municipal court lost jurisdiction and therefore its subsequent order restoring tenant to possession was void and subject to attack in certiorari proceeding by landlords. Code Civ.Proc. § 581.

◆

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Hartley Shaw, and Clarence L. Kincaid, Judges.

Certiorari proceeding by Edward F. Schubert and Eleanor Schubert against Lucille Bates to review municipal court's action in issuing a certain order of restitution in an unlawful detainer action in municipal court. From an order denying a petition for writ of certiorari, the applicants appeal.

Judgment reversed with directions to issue writ.

George R. Larwill and Charles W. Wolfe, both of Los Angeles, for appellants.

John F. Poole, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from an order denying a petition for a writ of certiorari.

The only issue involved is whether the municipal court had jurisdiction to issue a certain order of restitution in an unlawful detainer action in the municipal court.

The pertinent facts are as follows:

In 1943 appellants purchased the premises in dispute. In October of that year, a certificate of eviction was obtained from the OPA authorizing the eviction of respondent, who occupied the premises as tenant on a month-to-month basis. Respondent was permitted to occupy the premises until November 16, 1944. At that time, due to the failure of respondent to vacate the premises, the action in unlawful detainer was commenced. Plaintiffs, appellants here, obtained judgment on November 29, 1944 and the premises were ordered restored to plaintiffs. A stay of execution postponed possession until December 27, 1944. On or about December 26, 1944 respondent vacated the premises; furniture and belongings of the defendant tenant were removed. Thereafter the property was the home of plaintiffs. On February 9, 1945, defendant filed a notice of appeal from the judgment. There the case rested until August 10, 1945 when a bill of exceptions or statement on appeal was filed. October 11, 1945 the judgment was reversed and the cause, "remanded for a new trial, appellant to recover costs on appeal". On October 22, 1945, plaintiffs made a motion for dismissal. The court continued the matter for a hearing, whereupon plaintiffs, on the same date, namely October 22, 1945, dismissed the action in the manner and by authority of section 581 of the Code of Civil Procedure; the dismissal was then and there duly entered by the clerk. Subsequently, defendant filed a supplemental answer; no order or permission of the court so to do was first obtained. Later, defendant made a motion for restitution of the premises which, as noted above, had been vacated by defendant on December 26, 1944; on November 19, 1945 said motion was granted. Plaintiff then petitioned the superior court, in an original proceeding, for a writ of certiorari, which was neither granted nor denied but, instead, was disposed of as follows, "We therefore affirm the order of restitution." The opinion also recites in substance that certiorari was the proper remedy and that the municipal court in "restoring the evicted defendant to possession" had not abused its discretion. It will be assumed therefor, for the purposes of the appeal herein, that the superior court determined that the municipal court had jurisdiction to make the order of restitution and, in so doing, that there was no abuse of discretion, for which reasons, it will also be assumed, the petition for the writ of certiorari was denied. Manifestly, there was no authority, nor indeed, was there any need, in the certiorari proceedings, to "affirm the order of restitution", as that expression generally applies.

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* Subsequent opinion 185 P.2d 793.

In the opinion accompanying its judgment in the certiorari proceedings, the court cited Hansen v. d'Artenay 13 Cal.App.2d, 293, 57 P.2d 202, and Bank of America v. McLaughlin, 37 Cal.App.2d 415, 99 P.2d 548. The Hansen case was an action to quiet title and the appeal was from an order denying a motion for restitution. There the court noted [13 Cal.App.2d 293, 57 P.2d 203], "It is a general rule that a party, deprived of property under a judgment, reversed on appeal, is entitled to its restitution, and if restitution is not made by the appellate court, he may obtain possession by motion duly made in the trial court. 2 Cal. Jur. 1062, et seq., and cases cited. This rule is not absolute and unyielding and is subject to a well-recognized exception. In Spring Valley Water Works v. Drinkhouse, 95 Cal. 220, 30 P. 218, 219, the Supreme Court, in discussing this question, said: 'It is insisted that the reversal of the judgment gives appellant the absolute right to a restitution of the premises, but the wording of the statute will bear no such construction. The section is not mandatory upon the court, but the power conferred thereby is to be exercised when the circumstances of the case call for the use of a judicial discretion.' See, also, Yndart v. Den, 125 Cal. 85, 57 P. 761." The Bank of America case was an unlawful detainer action and the appeal was from the judgment. In connection with a motion for restitution, the court declared [37 Cal.App. 415, 99 P.2d 550], "the moving party has no absolute right to an order for restitution but the granting or denying of the motion rests in the sound discretion of the court to which the motion is addressed". The foregoing cases, although they confirm well-known general principles, have no application to the question presented herein, as will later appear. In said superior court opinion also appears the following:

"The further circumstance, that the plaintiffs dismissed their action, after the judgment which provided for the defendants' removal had been reversed, did not deprive the trial court of jurisdiction to restore the defendant to possession. A dismissal ends the action for most purposes, but not all. Proceedings incident to awarding the defendant costs, for example, may still be carried on. Spinks v. Superior Court, 1915, 26 Cal.App. 793, 148 P. 798; and see Matson v. Fortuna High School Dist., 1921, 54 Cal.App. 586, 202 P. 167. No doubt the court could, after a dismissal, release exhibits which had been received in evidence, or take action to dispose of any money that had been deposited. A plaintiff should not be enabled, by a dismissal of his action immediately after a judgment in his favor has been reversed, protect the gains, ill gotten because obtained under an erroneous judgment."

With regard to the relation of "costs" to "jurisdiction", it should be emphasized that the matter of "costs" is not the test of jurisdiction. Costs are merely incidental and more or less clerical. The Spinks case [26 Cal.App. 793, 148 P. 799] cited in the opinion of the superior court as noted above, was a proceeding to collect costs after dismissal and there the court declared, with regard to sec. 581, C.C.P., "On the other hand, the petitioner asserts that a dismissal so made does not interfere at all with his right to have a judgment following it entered, as he did, which would secure to him the expenses incurred in the action, and which were in their nature proper costs. We are in complete accord with this contention, and think that it proposes but a fair and reasonable construction for the statute. The dismissal as entered by the clerk upon the application of a plaintiff in such cases determines that action in favor of the opposite party; *that suit is then forever ended.* (Italics added.) While the matter of the recovery of costs is one which rests wholly upon the authority of the statutes, it cannot be contemplated that the Legislature, having provided authority and means for the securing of costs to litigants, intended to leave a defendant remediless against a plaintiff who chose to bring an action and put a defendant to great costs in preparing to meet the same and then dismiss the suit." Thus, even in the opinion relied on, the court declares the law to be that, upon filing the dismissal, "that suit is then forever ended", except as to the collection of costs.

It is also noteworthy that, inasmuch as no moral question was involved in plaintiff's petition for the writ, the observation that plaintiff in such circumstances should not be entitled to prevail because such "gains" would be "ill gotten", manifestly referred to a subject clearly beside the issue. Moreover, the record is destitute of evidence suggesting any wrong, legal or moral, on the part of plaintiff.

Respondent submits the "question at issue" in the within appeal as follows: "The only real question at issue is jurisdiction. Plaintiff claims jurisdiction to put defendant out, hence of necessity the court had jurisdiction to put defendant back." The argument is untenable, for it fails to take into account the action of the parties; and the law with relation thereto. Jurisdiction does not necessarily depend alone on the action of the court; jurisdiction may be acquired or lost by action of the parties. In the within action plaintiff filed a dismissal after the judgment was reversed and the cause remanded for a new trial. This the plaintiff had the right to do; and the dismissal ended the litigation. Whatever the municipal court did herein thereafter, was void ab initio; it had lost jurisdiction.

Upon the reversal of the judgment, the parties were restored to their original rights. Richards & Knox v. Bradley, 129 Cal. 670, 62 P. 316. The parties were in the same position as if the case had never been tried. Sharp v. Miller, 66 Cal. 98, 4 P. 1065. In Estate of Pusey, 177 Cal. 367, at page 371, 170 P. 846, at page 847, appears the following, "When an order has been reversed the effect is that: 'It no longer had any vitality or force, and the result was to leave the proceeding where it had stood before that order was made.' Estate of Mitchell, 126 Cal. 248, 250, 58 P. 549. In Ashton v. Heydenfeldt, 124 Cal. 14, 56 P. 624, 625, speaking of a decree which had been reversed, the court said: 'but that decree having been reversed—vacated—on appeal, the matter stood as though no decree had ever been made.' Many cases decide the same proposition". (Citing cases.) And in Central Savings Bank of Oakland v. Lake, 201 Cal. 438, at page 443, 257 P. 521, 523, the court declared, "It has long been the law of this state that an unqualified reversal remands the cause for a new trial (Falkner v. Hendy, 107 Cal. 49, 54, 40 P. 21, 386) and places the parties in the trial court in the same position as if the cause had never been tried, with the exception that the opinion of the court on appeal must be followed so far as applicable". The foregoing appears to be the general rule (126 A.L.R. 305); and this is especially true when authorized by statute. 5 C.J.S., Appeal and Error, § 1974, p. 1532. There can be no question as to plaintiff's right to dismiss the action. The judgment and order of reversal contained no directions; it merely remanded the cause for a new trial. The case, therefore, was in the same position as if it never had been tried and, the defendant having asked for no affirmative relief, the right in plaintiff to dismiss was absolute.

Again referring to the opinion and judgment of the superior court in the certiorari proceedings, the court used the expression "evicted defendant". The record herein reveals that defendant was neither in fact nor in law "evicted". It appears from the record and is not disputed that defendant, after judgment was pronounced in the trial of the action, surrendered the premises, established a residence elsewhere, removed the belongings and furniture, all without the necessity of resorting to any of the processes available to plaintiff, if necessary, in an unlawful detainer action. Black v. Knight 176 Cal. 722, 169 P. 382, 384, L.R.A. 1918C, 319 is particularly applicable to the situation here presented, and in that connection the court declared that, "Until the landlord does so enforce the judgment, he does not actually disturb the possession and beneficial enjoyment, and the case in this respect is just as it was before entry of judgment. The landlord is not compelled to carry the judgment into execution simply because it has been given and entered. He may well decide to withhold execution until the final determination of his action—until it has been finally determined that the tenant has forfeited his term, and that he may treat the term as forfeited and safely enforce his judgment. The tenant has no right to assume from the mere entry of judgment that the landlord intends to do otherwise. Authorities are, of course, ample to the effect that the tenant may accept not only the prosecution to judgment of such an action, but also the mere institution thereof, as such an election on the part of the landlord to terminate the lease that he will be justified in treating the lease as ended, and may yield possession of the premises and be free from further liability under the terms of the lease. Such is the meaning of the declaration in section 675 of Underhill on Landlord and Tenant, relied on by plaintiff, where Jennings v. Bond, 14 Ind.App. 282, 42 N.E. 957, is cited, the same being an action for rent after a suit in ejectment maintained by him and after a subsequent offered surrender of the premises by the tenant. This, however, is an entirely different proposition from the one involved in this case. Here the tenant so yielding possession without being required to do so is insisting that the act of the landlord in prosecuting his action to judgment shall be treated as an eviction, and the landlord held liable to him for any loss suffered from his failure to enjoy the remainder of the term. To our minds neither reason nor authority warrants the holding that such position is correct, where the tenant actually abandons the possession without being compelled to do so under any process issued and served under the judgment in the unlawful detainer proceeding, and the proceeding was brought and maintained in good faith and without malice."

For the foregoing reasons the judgment is reversed with directions to issue the writ in accordance with the views herein expressed.

YORK, P. J., and WHITE, J., concur.

UNION OIL CO. OF CALIFORNIA v. UNION SUGAR CO. et al.

Civ. 15324.

District Court of Appeal, Second District,
Division 2, California.
Oct. 25, 1946.

Rehearing Denied Nov. 13, 1946.
Hearing Granted Dec. 23, 1946.

1. Appeal and error 🔑882(3)

The theory of a case as presented by the pleadings and upon which it is tried determines the course of the action and must be adhered to throughout the proceeding until conclusion of the case on appeal.

2. Appeal and error 🔑172(3)

An appellate court will consider only such points as were raised in trial court, and a party is precluded from asserting on appeal claims to relief not asserted nor asked for in court below.

3. Appeal and error 🔑882(3)

Where plaintiff adhered throughout the proceedings in trial court to theory that the negotiations and correspondence offered in evidence were necessary for single purpose of dispelling an ambiguity in supplemental contract amending oil and gas lease, plaintiff would not be permitted on appeal to assert that the correspondence referred to had a different purpose, to wit, the creation of a new contract, or that the judgment should be reversed upon a theory not stated in trial court.

4. Contracts 🔑88, 346(2)

Where a contract is in writing, consideration therefor is presumed and a party seeking to show want of consideration must so allege and prove. Civ.Code, § 1614.

5. Reformation of Instruments 🔑36(2)

To state case of mistake authorizing reformation of written instrument it must be pleaded that language of the writing failed for some reason to express intention of the parties. Code Civ.Proc. § 1856.

6. Reformation of Instruments 🔑40

The statement, in notice of motion for leave to file amendment to complaint, to effect that if there was no ambiguity apparent on face of contract then ends of justice required that plaintiff be permitted to put in issue a mistake or imperfection of the contract, without making reference to any alleged mistake or imperfection, was insufficient to state cause of action for reformation. Code Civ.Proc. § 1856.

7. Contracts 🔑25

Whether parties intend that a written memorandum containing an offer and acceptance should constitute a contract, or that there should be no contract until execution of a formal written agreement, depends on intention of the parties as gathered from language used when interpreted in light of surrounding circumstances.

8. Contracts 🔑25

Where letters passing between persons negotiating a contract are understood and intended to be merely a formulation of terms of an agreement thereafter to be reduced to writing and signed by them, the letters do not constitute the contract and there is no binding agreement until terms agreed upon have been integrated.

9. Mines and minerals 🔑59

Evidence supported finding that letters exchanged by plaintiff's assignor and defendant were not intended to create a new contract amending oil and gas lease but rather that they intended that there should be no new agreement until put into a formal writing.

10. Evidence 🔑450(5), 461(1)

Examination of supplemental contract amending oil and gas lease showed that it contained no ambiguity or uncertainty and that it did not create any ambiguity in original lease, and hence parol evidence showing intent of parties was not admissible.

11. Contracts 🔑147(2)

A court has duty to declare meaning of what is written in instrument, and not what was intended to be written.

12. Contracts 🔑152

Under the guise of construction or explanation of a contract, courts are not empowered to depart from plain meaning of the writing or to insert a term or limitation not found therein.

13. Evidence 🔑442(1), 445(1), 448

Where parties have reduced to writing what appears to be a complete and certain agreement, in absence of fraud, accident, or mistake it will be conclusively presumed to contain the entire agreement, and parol evidence of prior, contemporaneous, or subsequent conversation will not be received for purpose of adding to or varying the written instrument.

14. Evidence 🔑429, 433(6), 448

No evidence of terms of an agreement other than contents of the writing will be received except where a mistake or imperfection therein is pleaded, where validity of the agreement is in dispute, or to explain an ambiguity.

15. Evidence 🔑384, 397(1)

The "parol evidence rule" is not a rule of evidence but is a rule of substantive law and is applied to contracts.

See Words and Phrases, Permanent Edition, for all other definitions of "Parol Evidence Rule".

16. Evidence 🔑384, 397(1)

The "parol evidence rule" as applied to contracts is that as a matter of substantive law the act of embodying the complete terms of an agreement in writing becomes the contract of the parties, and extrinsic evidence is excluded because it cannot serve to prove what the agreement was because the writing itself is, as a matter of law, the proof.

17. Contracts 🔑152

Although evidence of declaration of the parties may be received in some cases to explain contracts or words of doubtful meaning, the courts are not at liberty to add words to the document or to substitute words for those written therein by the parties. Code Civ.Proc. § 1860.

18. Mines and minerals 🔑59

Supplemental contract amending oil and gas lease would not be construed as intending to expunge provisions of original lease relating to number of strings of tools required to be kept in operation by lessee and substituting therefor the comparatively insignificant obligation to drill only three wells during each year after expiration of two-year intermission.

19. Appeal and error ⚷1011(1)

Conflict in the evidence will be disregarded on appeal where trial court's findings are sustained by substantial evidence.

◆

Appeal from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Action by Union Oil Company of California against Union Sugar Company and Pacific Coast Railway Company for declaratory relief construing a clause in a supplemental contract amending an oil and gas lease made by first-named defendant to plaintiff's predecessor. From an adverse judgment, the plaintiff appeals.

Affirmed.

L. A. Gibbons, Jerry H. Powell, and Douglas C. Gregg, all of Los Angeles, and Brobeck, Phleger & Harrison, Maurice E. Harrison, and Moses Lasky, all of San Francisco, for appellant.

Cross & Brandt, of San Francisco, for respondent.

WILSON, Justice.

This is an action for declaratory relief brought for the purpose of obtaining a judicial construction of a clause in a document, hereinafter referred to as the "supplemental contract," which amended an oil and gas lease made by respondent to appellant's predecessor. Findings and judgment were in favor of defendant and plaintiff has appealed.

By an agreement dated April 8, 1936, respondent leased to Sovereign Oil Corporation a tract of land containing approximately 6700 acres in Santa Barbara County for the production and extraction therefrom of oil, gas and other hydrocarbon substances. Subsequently defendant Pacific Coast Railway Company became a party to the lease by reason of its ownership of an 80-foot strip of land extending across a portion of the leased premises. It was named as a defendant in the action but permitted its default to be entered and is not a party to this appeal.

A detailed statement of the drilling provisions of the lease, the negotiations leading to the execution of the supplemental contract modifying the lease, the allegations in the pleadings, and the proceedings had at the two trials, including statements of counsel for appellant, is necessary in order to afford an understanding of the questions raised by the appeal.

The lease required the drilling of discovery wells and provided that if oil or gas should be found in paying quantities the lessee should continue to drill additional wells on the property until one well for each 10 acres should have been completed in the zone in which oil or gas was found in paying quantities. Paragraph 7 of the lease contained the following provision: "After the discovery of oil or gas in paying quantities on the demised premises, Lessee agrees to continuously operate one string of tools with due diligence for the first year after such discovery, two strings of tools for the second year after such discovery, three strings of tools for the third year after such discovery, four strings of tools for the fourth year after such discovery, and five strings of tools thereafter until the drilling requirements herein specified are complied with. Lessee may defer the commencement of the next well to be commenced with each string of tools to be operated hereunder for a period of not to exceed three months after the completion of the well next preceding the well drilled with that particular string of tools. The Lessee shall be entitled to drill as many additional wells on said land and premises as it desires."

The lease contained suspension privileges which permitted the lessee to refrain from drilling additional wells (1) while the value of oil of the quality produced from the land was 60 cents or less per barrel at the well; (2) when there was no available market for the oil at the well at such price; (3) while the lessee was prevented from complying with the lease by strikes, lockouts, action of the elements, accidents, rules and regulations of any federal, state, municipal or other governmental agency, or other conditions beyond the control of the lessee; (4) in the event that the lessee should be obligated to curtail production by reason of any valid order, rule, law, or regulation of any federal, state or other governmental subdivision, and in the event that such curtailment rendered it impossible for the lessee to drill wells and produce oil at a profit.

Prior to February 1, 1940, E. H. Moore, Inc. (hereinafter referred to as "Moore"), succeeded by assignment to all the rights of the Sovereign Oil Corporation in and to the lease. Following the latter assignment negotiations, both oral and in writing, which will be referred to in detail hereinafter, were entered into between Moore and respondent resulting in a modification of the lease in the particulars set forth in the supplemental contract dated February 1, 1940, which provided that (1) all obligations to drill additional wells, except offset wells, were suspended for two years after said date; (2) "at the expiration of said two-year period, Moore shall be obligated to complete three wells per year;" (3) the requirement as to offset wells was modified so as to provide for the drilling thereof when wells on adjoining property were drilled within 330 feet of the property line of the leased premises instead of 250 feet therefrom, as provided in the original lease; (4) commencing with the date of the supplemental contract, Moore was obligated to pay a minimum royalty of $25,000 per year, payable monthly in advance, which was to be charged against the total oil reserves during the life of the lease; that is to say, Moore would be entitled to all oil and gas produced from the lease, or the proceeds thereof, until fully reimbursed from the lessor's one-eighth royalty interest for the minimum royalty so paid; (5) "except in so far as the provisions of the lease of April 8, 1936, are in conflict herewith, the same shall remain in full force and effect."

Thereafter the lease as modified was assigned to appellant. On or about June 22, 1942, respondent served on appellant a notice of default, reciting that the latter was not operating continuously two strings of tools on the leased promises, the neglect so to do constituting a failure on the part of appellant to comply with the terms and conditions of paragraph 7 of the original lease above quoted, and notifying appellant that if such failure continued for ninety days after the date of the notice the lease would terminate and the lessee's right to drill additional wells on the lease would be forfeited.

A controversy having arisen concerning the effect of the above mentioned clause (2) of the supplemental contract pertaining to the number of wells required to be drilled during each year after February 1, 1942, and the relation of said clause to the drilling provisions in the original lease, this action was brought.

After setting forth the facts relating to the execution of the original lease and its modification by the supplemental contract, the complaint alleged that defendant claimed that the supplemental contract did not modify the drilling obligations contained in paragraph 7 of the original lease except to provide for a suspension of the drilling obligations for a period of two years and to provide that plaintiff should complete at least three wells in each year after February 1, 1942; on the other hand plaintiff claimed that the drilling obligations were modified by the supplemental contract so as to obligate plaintiff to complete only three wells in each year in lieu of the continuous operation of any specified number of strings of tools, and that upon the completion of three wells during each year until the drilling requirements of the lease were fully complied with plaintiff would be deemed to have performed fully the drilling obligations of the original lease as amended by the supplemental contract.

The prayer of the complaint was (1) that defendant be enjoined from terminating the original lease as amended and modified and from interfering with the operations of plaintiff upon the leased lands, and (2) that the court adjudge and determine "the rights, liabilities, duties, responsibilities and legal relations of the parties hereto with respect to the drilling of wells under and pursuant to said original lease as amended and modified by said supplemental contract."

An answer was filed and the case came on for trial on October 13, 1943. To a question propounded to a witness relating to the negotiations leading up to the supplemental contract respondent's counsel offered an objection "to any extrinsic evidence seeking to construe an interpretation of the contract on the ground that the contract is plain, that extrinsic circumstances or parol evidence is inadmissible to vary or interpret the instrument, and on the ground that it is incompetent, irrelevant and immaterial." The court sustained the objection, saying in the course of stating its reasons: "It is also the rule whether or not the contract is ambiguous or is not ambiguous on its face is a question of law to be determined by the Court. Going over the lease, paragraph 7 thereof, and paragraph 2 of the supplemental agreement, I am at a loss to find any ambiguity upon the face of the contract or lease or the supplemental agreement of a later date than the lease."

The significance of the objection to extrinsic evidence and of the remarks of the trial judge, coupled with the offer of proof following the ruling of the court, will appear in the discussion of the questions raised by the appeal.

Upon the sustaining of the objection to the evidence offered on behalf of appellant the latter's counsel made an offer of proof as follows: In October, 1939, Villard Martin, Moore's attorney and authorized representative, came to California from Oklahoma and conferred with the president of respondent company who referred him to T. A. Twitchell, who was then its attorney and counsel, for the purpose of discussing a modification of the drilling requirements contained in paragraph 7 of the lease. At that time the price of oil of the quality produced from the leased lands was 45 cents per barrel. The two attorneys arrived at a tentative plan providing: (1) For the suspension of all drilling operations for two years; (2) after the two-year suspension Moore would be required to drill only three wells per year and then only if the price of oil was more than 60 cents per barrel at the well, with the other drilling exemptions hereinbefore outlined; (3) that wells should be drilled only on the proved area which consisted of 400 acres, and Moore was not to be required to drill on the remaining 6300 acres unless oil was discovered thereon, or on adjacent property, thus indicating that oil could probably be discovered in the unproved area. Twitchell sent a written memorandum of the discussion with his recommendations to respondent and a copy to Martin. The latter returned to California in December, 1939, for the purpose of continuing the negotiations and found that shortly after the foregoing tentative plan had been arrived at the management of respondent had changed, and a new president, Roland Tognazzini, was in charge of its affairs. Martin and Tognazzini had a conference in the presence of two directors of respondent in which Martin said that Moore intended to construct a refinery but did not desire to expend money therefor unless he could secure relief from the drilling requirements of the lease which he might be unable to fulfill. After an extended discussion between them Martin returned to Oklahoma. Thereafter Martin wrote to Tognazzini outlining certain modifications of the lease which Moore desired. Tognazzini replied under date of January 16, 1940, suggesting four amendments in the form subsequently incorporated in the supplemental contract, and hereinbefore set forth. On January 25 Moore wrote to Tognazzini requesting additional modifications. Tognazzini replied on January 27 that the concessions asked for by Moore operated unilaterally in the latter's behalf and declined to consider his request but referred to his, Tognazzini's, previous letter and stated that if Moore desired a ratification thereof by respondent's board of directors, a meeting of which was to be held on January 31, Moore should signify his acceptance before that date. On January 29 Moore wrote to Tognazzini that the previous proposition made by the latter was accepted, and stating that "I will request Mr. Martin to prepare a modification of the lease embodying the principles contained in our correspondence and forward it to you within the next day or two." By a letter of February 1, Tognazzini notified Moore that respondent's board of directors had ratified the modifications contained in Tognazzini's letter of January 16 and accepted by Moore on January 29. The last letter was followed by the signing of the supplemental contract dated February 1, 1940, which is the subject of this action.

To the foregoing offer of proof and to the evidence proffered thereby respondent's counsel objected on the ground that it was incompetent, irrelevant and immaterial, and that "the lease and supplemental contract are plain on their face and that none of the proposed testimony is admissible." The objection was sustained. Then followed a discussion with reference to the preparation of findings in which counsel for appellant said, among other things: "We must give this contract under the code sections a construction that will be reasonable * * *. Our construction of the contract is, the paragraph of the supplemental contract, is that it is our obligation to complete three wells per year, and that that paragraph is a substitute for a former drastic provision, and is a reasonable compensation for that drastic monetary consideration." Counsel further stated that "the court should receive evidence of surrounding circumstances and see if the language used doesn't place on us an additional obligation over and above our obligation contained in the original lease." Other discussion by appellant's counsel with reference to the evidence offered for the purpose of aiding the court in the construction of the supplemental contract treated the latter as the only contract which operated to modify the original lease, and no claim was then made by counsel for appellant, as they now assert in their briefs, that the proposal made by Tognazzini on January 16, and its acceptance by Moore on January 29, of themselves constituted a binding contract between the parties or that the formal supplemental contract was surplusage.

On November 18, 1943, plaintiff gave defendant a notice of motion for leave to file an amendment to the complaint, a copy of which was served with the notice, upon the following ground: "* * * that in the light of the court's ruling that evidence would not be received of the circumstances surrounding, and the negotiations leading up to, the execution of the Supplemental Contract referred to in the complaint, the ends of justice require that plaintiff be permitted to set up the facts showing if there is no ambiguity apparent on the face of the contract which is the subject of the action, to-wit, the Original Lease, as amended and modified by said Supplemental Contract, then the ends of justice require that plaintiff be permitted to put in issue a mistake or imperfection of the said contract as provided in Section 1856 of the Code of Civil Procedure, so that the aforesaid evidence may be admitted and the case heard on its merits, pursuant to Section 473 of said Code of Civil Procedure, and the rules of procedure obtaining in equitable proceedings."

The proposed amendment to the complaint consisted of a second cause of action in which the oral negotiations and the exchange of letters which resulted in the signing of the supplemental contract were set forth substantially in the same form as contained in the offer of proof which has been outlined at length. The court granted leave to file the amendment and respondent filed its answer. The amendment did not contain a prayer for relief.

When the case came on the second time for trial on June 5, 1945, counsel for appellant made an opening statement outlining the evidence which he expected to offer on behalf of appellant. He referred to the letters which were exchanged between the parties "until they came to an agreement at which time an agreement known as the Supplemental Contract to the Original Lease was executed. Now as your Honor will recall, the language contained in the Supplemental Contract has to be reconciled with the language contained in the Original Lease. For the purpose of reconciling that language and of interpreting the Supplemental Contract, we have set up in our Amended Complaint the negotiations and letters that led up to the making of the agreement in order to put the Judge trying the case—Section 1860 of the Code of Civil Procedure provides—in the position of the parties in order that he may properly interpret the agreement and determine what was intended by the amendment to the lease."

When evidence of the oral negotiations and of the written communications passing between the parties was offered respondent's counsel objected on the ground that it was incompetent, irrelevant and immaterial and was an attempt by parol to vary the terms of a written contract. Appellant's attorney again argued that the evidence was admissible to explain an ambiguity, but that even though there were no ambiguity on the face of the contract the court was entitled to know the circumstances of the parties and those surrounding the object of the contract, that is, the preliminary negotiations and circumstances leading to its execution, in order better to interpret it. The objection was overruled and the evidence outlined in the offer of proof made at the first trial was admitted.

This extended review of the proceedings is given in order that it may appear clearly that the theory of the case as presented by appellant in the trial court was that the meaning and effect of the supplemental contract was in dispute, and that we are asked to review the case and to reverse the judgment on an entirely different theory, to wit, that the real contract between the parties was created by two letters that anteceded the supplemental contract.

1. *The theory tendered by appellant in the briefs on appeal relating to the supplemental contract is not the theory on which the case was tried.* Although the case was presented to the trial court on the hypothesis that the supplemental contract was ambiguous and uncertain and that evidence was required to enable the court to discover and declare its true meaning, appellant asserts on appeal for the first time that the supplemental contract is not the contract that it sought to have construed; in fact, that it is not a contract at all, but that, as stated in its brief, "the letters of January 1940 were not merely negotiations but were themselves a complete and binding agreement" and constitute the real and the only contract modifying the lease. Notwithstanding (1) that the prayer of the complaint asked the court to determine the rights and liabilities of the parties under the lease as amended by the supplemental contract; (2) that the motion for leave to amend the complaint referred to that contract and not to the letters; (3) that the case was tried, extrinsic evidence was presented and arguments were made to the trial court to assist the court in determining the meaning of the supplemental contract and to aid in its construction; and (4) that by its judgment the court determined the effect of the provisions of the supplemental contract upon the drilling requirements of the original lease, this court is now asked to disregard that contract as ineffective, inoperative and nonexistent and to consider the letters as constituting the only contract modifying the lease.

The complaint represented the controversy of the parties to be with reference to the particulars in which the supplemental contract of February 1, 1940, modified the original lease. It was not alleged in the complaint nor was it claimed at either of the trials that the letters passing between Tognazzini and Moore constituted a contract. The letters were not mentioned in the complaint and when they, with testimony relating to previous negotiations and correspondence, were offered in evidence at the first trial counsel for appellant stated that "the court should receive evidence of the surrounding circumstances" for the purpose of determining to what extent the obligations of the parties under the lease were modified by the supplemental contract. The prayer of the complaint referred not to the letters but to the supplemental contract. At the first trial the offer of proof of the negotiations and correspondence was expressly stated to be for the purpose of explaining an ambiguity claimed to have been created by the supplemental contract, and the entire argument upon respondent's objection to the reception of the evidence contained in the offer of proof centered upon that contract.

The notice of motion for leave to file the amended complaint was upon the ground that "the circumstances surrounding and the negotiations leading up to the execution of the supplemental contract" should be before the court, and that if there were no ambiguity in the original lease as modified by it then plaintiff should be permitted "to put in issue a mistake or imperfection in the said contract." (Mistake was not pleaded in the complaint or in the amendment.) The amendment to the complaint contained allegations of the oral negotiations and the correspondence preceding the execution of the supplemental contract, and at the second trial appellant's counsel, in his opening statement, referred to the negotiations and correspondence and to the execution of "an agreement known as the supplemental contract," stating that it was necessary that the language contained in the latter be reconciled with the provisions of the original lease, and that "for the purpose of reconciling that language and interpreting the original contract" the negotiations and letters leading to the execution of the supplemental contract had been pleaded in the amendment to the complaint.

The action was commenced more than four years ago. The record on appeal contains nothing to indicate that at any time during its progress through the trial court was the suggestion made that the proposal of Tognazzini and its acceptance by Moore created a contract. We give no consideration to references in appellant's reply brief to arguments that may have been made to the trial court or to other matters that do not appear in the record before us. The contention that the letters of January, 1940, were not merely a part of the prolonged negotiations for a modification of the lease "but were themselves a complete and binding agreement" appears nowhere in the pleadings or in plaintiff's motions but has been presented for the first time in appellant's opening brief on appeal.

[1, 2] The theory of a case as presented by the pleadings and upon which it is tried determines the course of the action and must be adhered to throughout the proceedings until the conclusion of the case on appeal. A different practice would be unfair to the trial court and unjust to the opposing litigant. Ernst v. Searle, 218 Cal. 233, 240, 22 P.2d 715; Sanborn v. Pacific Mutual Life Ins. Co., 42 Cal.App.2d 99, 106, 108 P.2d 458; Coy v. E. F. Hutton & Co., 44 Cal.App.2d 386, 391, 112 P.2d 639; Foti v. Morrissey, 57 Cal.App.2d 328, 331, 134 P.2d 51; Mathews v. Pacific Mutual Life Ins. Co., 47 Cal.App.2d 424, 428, 118 P.2d 10; Durkee v. Chino L. & W. Co., 151 Cal. 561, 571, 91 P. 389; Kaufman v. Tomich, 208 Cal. 19, 26, 280 P. 130; Gibson Properties Co. v. City of Oakland, 12 Cal.2d 291, 299, 83 P.2d 942; Merrill v. Kohlberg, 29 Cal.App. 382, 386, 155 P. 824; Salmon v. Allen, 1 Cal.App.2d 115, 120, 36 P.2d 153. An appellate court will consider only such points as were raised in the trial court, and a party is precluded from asserting on appeal claims to relief not asserted nor asked for in the court below. Hayward Lumber & Inv. Co. v. Ford, 64 Cal. App.2d 346, 354, 148 P.2d 689.

[3] The issues to be determined by this court are to be ascertained from the pleadings, augmented and emphasized by the purpose of the offer of extrinsic evidence as expressed by appellant's counsel, from the grounds upon which appellant's motion for leave to file the amendment to the complaint was based, and from the arguments made to the trial court, in so far as shown by the record, concerning the admissibility of the evidence. Having adhered throughout the proceedings to the theory that the negotiations and the correspondence were necessary for the single purpose of dispelling an ambiguity in the supplemental contract, appellant will not now be permitted to assert that the letters referred to had a different purpose, to wit, the creation of a new contract, or that the judgment should be reversed upon a theory not stated nor even intimated in the trial court and which the trial judge consequently had no opportunity to consider and determine.

Appellant has furnished no explanation of its change of theory after judgment went against it in the trial court, nor has it offered any justification for having tendered a question for judicial consideration and determination which, under its current theory that the supplemental contract is not the real contract between the parties, is without foundation for want of a subject. A party to an action may not depart from the course it has set for itself, but must adhere to the theory on which the case was based and not meander like a stream that changes its direction whenever a new obstacle is encountered.

If, as now argued by appellant, the letters created the agreement between the parties then the supplemental contract which is the sole subject of the action is not a contract and is superfluous. From this premise, if admitted, two consequences would eventuate: (1) That the action is based on a nonexistent contract and the complaint does not state a cause of action. (2) Since the letters were pleaded for the one purpose of explaining an alleged ambiguity in the supplemental contract and not with the object of having them construed, the trial court did not and we cannot interpret their meaning, although their construction has been argued on appeal. In either dilemma the action would fail and all the proceedings in the case would have been in vain.

Appellant advances two additional theories in its brief not presented at the trial which, for convenience, may be stated together. It is asserted that the supplemental contract did not supersede the agreement created by the letters because (1) as so construed it was without consideration and for that reason void; (2) the supplemental contract was intended to formalize the letters and if it failed to express that intention such failure was the result of mistake or imperfection. There is no necessity for elaboration of the arguments made on these propositions since (a) the case was not tried on either theory and for the reasons hereinbefore stated cannot be considered by a reviewing court, and (b) neither want of consideration nor mistake was pleaded and no proof was offered thereon.

[4] When a contract is in writing consideration therefor is presumed (Civ.Code, sec. 1614) and a party seeking to show want of consideration must so allege and prove. Kruce v. Parlier Winery, 208 Cal. 723, 725, 284 P. 671; Pastene v. Pardini, 135 Cal. 431, 433, 67 P. 681; Bryan v. Banks, 98 Cal.App. 748, 755, 277 P. 1075; Flint v. Giguiere, 50 Cal.App. 314, 318, 195 P. 85; California Standard Finance Corp. v. J. D. Millar Realty Co., 118 Cal.App. 185, 191, 5 P.2d 41.

[5, 6] The only reference in the record to which our attention has been called relating to a mistake in the supplemental contract appears in the notice of motion for leave to file the amendment to the complaint to the effect that if there is no ambiguity apparent on the face of the contract then the ends of justice require that "plaintiff be permitted to put in issue a mistake or imperfection of said contract." Notwithstanding the statement of this ground for the motion, the amendment to the complaint made no reference to any alleged mistake or imperfection. To state a case of mistake it must be pleaded that the language of the writing failed for some reason to express the intention of the parties. Code Civ.Proc., sec. 1856; Harding v. Robinson, 175 Cal. 534, 542, 166 P. 808; Pascoe v. Morrison, 219 Cal. 54, 56, 25 P.2d 9; Auerbach v. Healy, 174 Cal. 60, 63, 161 P. 1157; Carr v. King, 24 Cal. App. 713, 724, 142 P. 131.

[7, 8] 2. *The letters of January, 1940, were not intended to and did not create a new contract between Moore and respondent.* A series of letters, even though containing an offer and an acceptance, do not necessarily create a binding contract. Whether such result has been accomplished depends always upon the intention of the parties. Whether they intended a memorandum to constitute a contract or that there should be no contract until the execution of a formal written agreement depends on the intention of the parties as gathered from the language used when interpreted in the light of surrounding circumstances. Atlantic Terra Cotta Co. v. Chesapeake Terra Cotta Co., 96 Conn. 88, 113 Atl. 156, 159; Mississippi, etc., Co. v. Swift, 86 Me. 248, 29 A. 1063, 1066, 41 Am.St.Rep. 545; Priest v. Oehler, 328 Mo. 590, 41 S.W.2d 783, 787. Though there has been a proposal sufficiently accepted to satisfy the general rule, the parties may nevertheless intend that there shall be no agreement binding in law until put into a formal writing. El Reno Wholesale Grocery Co. v. Stocking, 293 Ill. 494, 127 N.E. 642, 645; Windsor Mfg. Co. v. S. Makransky & Sons, 322 Pa. 466, 186 A. 84, 86, 105 A.L.R. 1096. When letters passing between the persons negotiating a contract are understood and intended to be merely a formulation of the terms of an agreement thereafter to be reduced to writing and signed by them, the letters do not constitute the contract and there is no binding agreement until the terms agreed upon have been integrated. Spinney v. Downing, 108 Cal. 666, 668, 41 P. 797; Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 461, 469, 168 P. 1037; Van Hoosen v. Briscoe, 85 Cal.App. 746,

749, 259 P. 1115; Sam Aftergut Co. v. Mulvihill, 25 Cal.App. 784, 786, 145 P. 728; Toms v. Hellman, 115 Cal.App. 74, 77, 1 P.2d 31; Las Palmas Winery, etc., v. Garrett & Co., 167 Cal. 397, 400, 139 P. 1077.

The cases cited by appellant do not bear out its assertion that a contract was created by the letters but affirm the rule that the intention of the parties determines when a contract comes into being—whether by reason of their letters or whether its effectiveness must await the signing of a paper embodying the terms agreed upon in the correspondence. For example, in Levin v. Saroff, 54 Cal.App. 285, 289, 201 P. 961, the court said that whether an instrument is a lease or an agreement to execute a lease is a question of the *intention* of the parties, and in Hollenbeck v. Lunderville, 67 Cal. App. 432, 441, 227 P. 679 and Fry v. Foster, 179 Okl. 398, 65 P.2d 1224, 1225, it is said that parties may make an informal agreement that will create an obligation notwithstanding their expressed expectation to execute a formal contract subsequently, if it appears that the parties intended the formal agreement to be binding on them from the time it was made.

[9] The instant case presents no exception to the general rule hereinbefore stated. That the letters of January, 1940, between Tognazzini and Moore did not and were not intended by them or by their respective corporations to constitute a contract is clearly indicated: (1) In Tognazzini's letter of January 16 he said: "But you and I, in obtaining a modification, desire to reduce it to its simplest form and to this extent I suggest the following." He then stated the concessions that he was willing to make. (2) Moore answered on January 25 saying that certain of Tognazzini's suggestions "would be acceded to * * * except that there should be some conditions attached" providing for exemption from drilling under certain market conditions. (3) Tognazzini replied on January 27, to the effect that if Moore desired respondent's board of directors to ratify the proposed amendments "it would be a simple matter to draw up a modification as heretofore outlined, the language pertaining thereto to be satisfactory to both parties." (4) Moore accepted Tognazzini's proposition on January 29, saying that he would request his attorney, Martin, "to prepare a modification of the lease embodying the principles contained in our correspondence and forward it to you within the next day or two." (5) In Tognazzini's letter to Moore dated February 1 he stated that respondent's board of directors had ratified the "proposed" modification of the lease as contained in the previous letters between the parties and "I am sure that Mr. Martin and I will be able to embody the principles agreed upon, to the satisfaction of all parties, and I shall do nothing further in this connection until I hear from Mr. Martin." (6) On February 1 Martin forwarded a draft of the supplemental contract to Tognazzini and said that when it was signed by respondent he, Martin, would forward it to the Pacific Coast Railway Company for execution by it. (7) In addition to the matters contained in the offer of proof which we have outlined, the evidence discloses that the draft sent on February 1 by Martin to Tognazzini contained the amendments suggested by the latter and accepted by Moore, but added a clause providing for the discontinuance of the minimum royalty of $25,000 per year if the lessee surrendered all undeveloped portions of the leased property. By a letter of February 5 Tognazzini informed Martin that the added clause had never been contemplated or implied and was not acceptable to respondent. The supplemental contract was then retyped in the form appearing in evidence and was signed by both parties.

From the beginning of the negotiations until the actual signing of the supplemental contract Moore was appealing for greater concessions than respondent was willing to grant. His plea for further indulgence was even carried into the first draft of the formal agreement prepared by Martin after Moore had written the letter accepting Tognazzini's offer. Both Tognazzini and Moore referred in several letters to the drawing up of the modification, the latter's attorney to prepare and forward it. There can be no other conclusion than that the letters exchanged between the parties were never intended or regarded by them as a contract and that there was in fact no contract until the formal document which appellant has asked the court to construe was signed by respondent and Moore.

3. *The construction to be placed on the supplemental contract. To what extent did it modify the original lease?* The court found as facts that the supplemental contract did not and was not intended by the parties to modify or abrogate the drilling obligations of paragraph 7 of the lease except to provide for the suspension thereof for a period of two years and to provide that the lessee should, in any event, complete at least three wells each year after February 1, 1942; that the lessee was required and obligated by said paragraph to operate continuously the number of strings of tools specified therein, increasing the number from year to year as prescribed, with the privilege of suspending drilling obligations during the existence of conditions provided in said paragraph and as hereinbefore enumerated; that by the supplemental contract drilling obligations were suspended until February 1, 1942, at which time the lessee became obligated, notwithstanding the suspension provisions, to complete in any event three wells each year; that after said date and during the remainder of the term of the lease the lessee was and is required to conduct drilling operations continuously with the particular number of strings of tools specified in paragraph 7 of the lease. The foregoing recitals in the findings of fact are repeated in the conclusions of law and in the judgment.

Since the trial court's construction and definition of the lessee's obligations to drill and complete wells pursuant to the lease as modified by the supplemental contract are set forth as its findings of fact and as its conclusions of law reached from the facts, and are carried into the judgment, and since our views upon its interpretation are in accord with those expressed therein, it is not essential to a decision of the case that we determine whether a reviewing court may place a construction on the contract different from that declared by the trial court or whether the questions concerning its construction are questions of law or of fact. If of law, we agree with the trial court in its decision as expressed in the conclusions of law; if of fact, its determination is pronounced in the findings of fact and the findings and judgment are sustained by the evidence.

[10] We find no ambiguity or uncertainty in the supplemental contract nor do we find that said contract created an ambiguity in the lease. While the latter provided that no wells need be drilled when conditions existed as hereinbefore related, and that when the price of oil was more than 60 cents per barrel wells should be drilled at an increased rate until five strings of tools were in operation, the amendment provided a respite in drilling operations for two years under any and all conditions, after which time the lessee, likewise under any and all conditions, was required to drill three wells each year. It was also stipulated in the amendment, apparently by way of emphasizing the continuance of the previous obligations, that except in so far as the provisions of the lease were in conflict therewith the lease should remain in full force and effect. The only conflicts between the lease and the supplemental contract are (1) the suspension for two years of the drilling provisions of the lease; (2) the obligation to drill three wells each year thereafter without benefit of the suspension clauses; (3) the requirement as to offset wells; (4) the engagement to pay minimum annual royalty. All other provisions of the lease remained in force (a) because they were not amended, and (b) by reason of the express provision of the supplemental contract continuing them in effect. It is obvious that in return for a forbearance granted to the lessee on one obligation the latter was required to grant a concession to the lessor on another. The latter was willing to permit the suspension of all drilling provisions for two years even though the price of oil should be in excess of 60 cents per barrel during that period, and in return it demanded the drilling of three wells per year thereafter although the price should remain below that figure and curtailment orders should be in effect; but the provision in the lease as to the number of strings of tools to be kept in operation when the price of oil was more than 60 cents per barrel, increasing the number each years for five years, remained un-

changed. This is the only rational construction that can be placed on the lease as modified when the documents are considered without the aid of extrinsic evidence, as they must be by reason of the absence of ambiguity.

[11-13] It is the duty of the court "to declare the meaning of what is written in the instrument, and not what was intended to be written." Payne v. Commercial Nat. Bank, 177 Cal. 68, 72, 169 P. 1007, 1008, L.R.A.1918C, 328; Fraters Glass & Paint Co. v. Southwestern Const. Co., 200 Cal. 688, 695, 254 P. 1097. Under the guise of construction or explanation of a contract courts are not empowered to depart from the plain meaning of the writing or to insert a term or limitation not found therein. Tanner v. Title Ins. & Tr. Co., 20 Cal.2d 814, 824, 129 P.2d 383. Where the parties have reduced to writing what appears to be a complete and certain agreement, in the absence of fraud, accident or mistake it will be conclusively presumed to contain the entire agreement, and parol evidence of prior, contemporaneous or subsequent conversations will not be received for the purpose of adding to or varying the written instrument. Palma v. Leslie, 6 Cal. App.2d 702, 707, 45 P.2d 391; United Iron Works v. Outer Harbor, etc., Co., 168 Cal. 81, 85, 141 P. 917; Estate of Gaines, 15 Cal.2d 255, 265, 100 P.2d 1055; Van Haaren v. Whitmore, 2 Cal.App.2d 632, 634, 38 P. 2d 829.

[14-17] No evidence of the terms of an agreement other than the contents of the writing will be received except (1) where a mistake or imperfection therein is pleaded; (2) where the validity of the agreement is in dispute; or (3) to explain an ambiguity. Nourse v. Kovacevich, 42 Cal. App.2d 769, 771, 109 P.2d 999. The parol evidence rule is not a rule of evidence but is one of substantive law and is applied to contracts. The rule is that as a matter of substantive law the act of embodying the complete terms of an agreement in writing becomes the contract of the parties. Extrinsic evidence is excluded since it cannot serve to prove what the agreement was because the writing itself is, as a matter of law, the proof. Estate of Gaines, supra. The rule stated in section 1860* of the Code of Civil Procedure can be invoked only for the purpose of explaining an ambiguity on the face of the writing. Although evidence of the declarations of the parties may be received in some cases to explain contracts or words of doubtful meaning, the courts are not at liberty to add words to the document or to substitute words for those written therein by the parties. Barnhart Aircraft, Inc., v. Preston, 212 Cal. 19, 22, 297 P. 20; Peterson v. Chaix, 5 Cal.App. 525, 532, 90 P. 948.

[18] These well established rules of construction plainly forbid the interpretation of the meaning of the supplemental contract to be that the provisions of the original lease relating to the number of strings of tools required to be kept in operation were expunged and that there was substituted therefor the comparatively insignificant obligation to drill only three wells during each year after the expiration of the two-year intermission.

If the entire tract of 6700 acres covered by the lease should prove to be productive of oil it would be 200 years before all wells required by the lease, one for each 10 acres, would be completed at the rate of three wells each year. It was conceded that 400 acres had already been proved to be oil producing. If the supplemental contract should be construed to have the meaning attributed to it by appellant it would be approximately 12 years before the drilling obligations would be completed in the proved lands, allowing for the wells already drilled and in production. It is unreasonable to assume that respondent's officers, who throughout the negotiations were contending for a substantial return from the property, would have agreed to an arrangement that would postpone the development of its resources for so long a period.

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* Section 1860 reads as follows: "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

Moore was the lessee when the supplemental contract was executed. The evidence discloses that Martin, his attorney, for many years had been counsel for persons and corporations engaged in the oil business and had had long experience in the preparation of oil leases. If it had been intended that the drilling obligations contained in the original lease should be superseded by the requirement of only three wells each year until the entire tract had been explored the addition of a few words would have made the intent clear, and it must be assumed that Martin would have protected his client's interests by inserting such words in the contract.

[19] We would reach the same conclusion upon the construction of the contract if we gave consideration, as appellant asserts we should, to the negotiations preceding the supplemental contract. There is practically no dispute as to the facts—the negotiations, oral and in writing, leading up to the signing of the contract—and such conflict in the evidence as there may be will be disregarded since the court's findings are sustained by substantial evidence. Buckhantz v. R. G. Hamilton & Co., 71 Cal.App.2d 777, 779, 163 P.2d 756, and cases cited; Berger v. Steiner, 72 Cal.App.2d 208, 164 P.2d 559; Estate of Isenberg, 63 Cal.App.2d 214, 216, 146 P.2d 424; Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. The record shows these facts: Moore was concerned with the marketing of the oil produced from the leased property. The Union Oil Company was the only purchaser in that field and it fixed the price paid to producers of crude oil. Moore was dissatisfied with the manner in which the price had been increased and decreased at intervals and in order to secure a market for the oil he was considering the erection of a refinery. He had incurred expense in discussing plans for the refinery with a firm of engineers and was prepared to proceed with the work. By reason of the large expenditures necessary in its construction he desired to be freed from all drilling obligations for two years. Tognazzini was willing to grant the requested concession but one of the conditions demanded by him was that after the expiration of that period three wells should be drilled each year regardless of the price of oil. He testified that in the conference between him and Martin there was no discussion concerning the drilling requirements if the price of oil should be more than 60 cents per barrel after the two-year period, and that the drilling provisions of the lease would prevail; that although the price of oil was then below said figure Martin stated that an increase was anticipated and that the requested respite was desired because of the contemplated expense of erecting the refinery. Tognazzini's testimony was corroborated by two directors of respondent corporation who were present during the conversation. This evidence sustains the findings of fact. In the letters that followed there is no indication of an intention on the part of respondent to recede from the position taken by Tognazzini in the conference above mentioned.

It is of no importance whether any of the matters contained in the findings are findings of fact or conclusions of law. We need only repeat that if they are findings of fact they are sustained by the evidence. If they are matters of law their presence in the findings of fact is harmless since they are repeated in the conclusions of law.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

LINDEN v. RUBENS et al.
RUBENS v. LINDEN.
Civ. 15353.

District Court of Appeal, Second District, Division 2, California.
Nov. 1, 1946.
Rehearing Denied Nov. 19, 1946.
Hearing Denied Dec. 23, 1946.

1. Partnership ⚷53

In action for dissolution of partnership and for an accounting, evidence was sufficient to show that plaintiff entered into partnership with defendant, and that defendant's husband was co-owner with defendant of the interest in the partnership standing in defendant's name, and that plaintiff's father was not a partner but merely assisting plaintiff in conduct of partnership business.

2. Evidence ⚷588

A judge trying case must reject testimony which does not have a convincing quality.

3. Appeal and error ⚷931(1), 1008(1)

The trial judge must determine the ultimate facts from a consideration of all the evidence submitted, and his findings, in absence of prejudicial error, will not be disturbed, but should be given the benefit of every reasonable inference fairly deducible from the evidence.

4. Appeal and error ⚷205

An assignment of error to exclusion of testimony could not be considered on appeal for want of offer of proof that such testimony was material.

5. Appeal and error ⚷1058(2)

The exclusion of testimony of witness concerning telephone conversation with cross-defendant, contradictory of cross-defendant's previous testimony that he had not had such a conversation, if error, was harmless, where witness later testified that she had never seen cross-defendant prior to witness' appearance in court.

Appeal from Superior Court, Los Angeles County; Honorable Joseph W. Vickers, Judge.

Action for dissolution of partnership and for accounting by Joseph Linden, Jr., against Mary Gertrude Rubens and Frank S. Rubens, sued herein as John Doe. Frank S. Rubens filed a cross-complaint against Joseph Linden, Sr. From the judgment, the defendants appeal.

Affirmed.

Haas & Home, of Los Angeles, for appellants.

Clarence Hansen, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiff instituted this action for the dissolution of a partnership and for an accounting against Mary Rubens and John Doe. A general denial was filed by Mrs. Rubens in which she was joined by her husband, Frank Rubens, who answered instead of our fictitious friend. Frank filed his cross complaint against Dr. Joseph P. Linden, father of plaintiff, hereinafter referred to as the Doctor, and alleged that the latter and he had entered into a partnership on January 19, 1943, for the buying, selling and installing of physiotherapy machines; that "said partnership was a part of the alleged partnership described in plaintiff's complaint"; that the Doctor has "possession of the books and assets of the partnership and has prevented cross-complainant from having access to the same." He demanded an accounting. Following a trial an interlocutory judgment was awarded plaintiff and relief on the cross-complaint was denied. Findings having been waived, judgment was entered from which comes this appeal.

The primary question for decision is whether the evidence is sufficient to support the judgment. To sustain the interlocutory decree it is necessary that from all the evidence favorable to plaintiff and cross-defendant the implied findings be so evidentially supported as to establish (1) that Mrs. Rubens entered into a partnership with plaintiff; (2) that Frank Rubens was vitally interested as a partner with his wife in the ownership of one-half interest in the business established; and (3) that the Doctor was not a partner but merely gave aid and assistance to his son in the conduct and maintenance of the partnership business. A summary of the evidence adopted by the court below will disclose the hopelessness of the appeal.

In December, 1942, plaintiff, herein referred to as Junior, called on defendant Frank Rubens concerning certain electric therapy equipment which the latter had advertised for sale. After hearing a description of the "multiple-unit machine" plaintiff departed. He next met Frank at the office of the Doctor about January 18, 1943. Frank then explained that he had been engaged in a business known as Therapy Products Co.; that he had gone into bankruptcy; that one Arons had purchased the therapy machines for Mrs. Rubens; that when the balance of $7,200 should be paid to Arons "all of the equipment, supplies and apparatus would revert to Mrs. Rubens who was buying the things" because Frank was still "in litigation on the bankruptcy end of it and he really could not purchase any of it himself"; that his time limit for paying the balance to Arons was approaching and if Arons should not be paid he would keep the equipment; that for these reasons he desired to go into business with someone who could either pay the balance or sell the machines, the value of which he said was about $50,000.

On January 19 both defendants returned to the Doctor's office where, after some conversation, it was agreed that Junior and Mrs. Rubens should form a partnership to be known as Therapy Products Co. After rewriting the contract as proposed by Frank in order to provide for the rental by the partnership of certain equipment of Mrs. Rubens and for the advancement of $200 monthly to her by the partnership the document was signed by the two. They then agreed upon certain details for the conduct of the business. They selected a bank for their money transactions, employed Frank to do the selling, and agreed that if machines should not be sold in sufficient quantity to pay the Arons' balance they would borrow the deficiency from the Doctor.

Junior actively managed the business: Opened the bank account; had check books printed for himself and Mrs. Rubens; helped deliver machines that were sold; kept records of sales and payment dates and sent notices to delinquent debtors. In July, 1943, the balance of $1,000 due Arons was paid with partnership checks drawn by Junior, the funds having been obtained from the sales of the machines. Mrs. Rubens issued some six checks on the firm's bank account, but otherwise took no active part in the conduct of the business.

[1] From the foregoing facts it was an unavoidable deduction that Mrs. Rubens entered into a partnership relation with plaintiff for the conduct of the Therapy Products Company which was to engage in the construction, sale and installation of the electrical therapy equipment.

The proof of Frank Ruben's ownership of an interest in the partnership is found in his statements to the Doctor about January 12 that he had many machines to sell; that they were part of his bankrupt stock; that he was looking for some one to go into partnership with him, that is, to go in with his wife since the machines belonged to her. He had been selling them and turning in the money to his friend Arons who had purchased them at the trustee's sale in the name of Mrs. Rubens.

When the parties met at the Doctor's office on January 19, Frank produced the draft of a proposed contract of partnership between Junior and Mrs. Rubens written by his own hand. He stated that he was willing to sell the machines but his selling expenses would have to be paid by the company. After reading the draft Junior typed it. Frank alone discussed the contents of the writing with Junior and sat in the room with him as he typed the instrument. After the business had been organized Frank devoted most of his time to the sales of the machines, although no salary was ever paid for his service. He demonstrated the appliances at the company's office and was familiarly in and out of the place. In September, 1943, Frank took all of the partnership files, checks, statements, and sales contracts from the office to his home to check the records. When Junior at one time suggested the payment of moneys due the doctor Frank stated "that he had to pay another loan before he could pay the doctor." Finally, Frank Rubens came into court and by his own pleading declared that he had "entered into a partnership with the doctor for the buying and selling of physiotherapy machines" and that it was "a part of the alleged partnership described in plaintiff's complaint. * * *" From such facts it was a reasonable deduction that Frank Rubens was in fact a co-owner with his wife of the interest in the partnership standing in her name.

By believing the Doctor's testimony the task of the trial court was simplified in deriving that he was not interested as a partner in the enterprise of Junior and the Rubens family. After a discussion of Frank's proposal that a company be formed by Junior and Mrs. Rubens, the Doctor stated that while he had no desire to enter into business especially because he was then litigating with a former business associate, yet he would like to see Junior in a business of his own choice and of good prospects for profit. He offered to advance the money for his son and to do all possible to get the boy established in such a business with Mrs. Rubens.

While it is true that the Doctor allowed the business to be conducted in his office, recommended the machines to other chiropractors, made collections from some purchasers and advanced moneys as requested by Junior, the evidence generously warrants the finding that the Doctor never intended to be a participant in the profits or the losses of the company or to exercise any control thereof. His only connection with the business, besides housing it and lending his son money to advance to it, was to give information as to other doctors needing equipment of the type sold by his son's firm. At the very outset he emphasized that he had had so much trouble with a former associate that he would go into business with no one; that his son was unemployed, devoted to mechanics and physics, and if the latter were interested the Doctor would furnish money to effect the release of the merchandise from Arons. He never signed a writing or orally promised that he would be a partner of either Frank or Mary Rubens. He received no salary or commission from the company. He gratuitously commended its products, collected its moneys and advanced such sums as Junior requested. He never had a key to any house that sheltered equipment stored by the partnership. His report of sales by Therapy Products Company through the Physical Therapy Company's sales permit was regarded by the trial judge as merely one more favor to his son.

[2, 3] The rejection of the testimony of Frank Rubens was the privilege of the trial judge; in fact, it was his duty to reject it if it did not have a convincing quality. Indubitably the court was influenced by Frank's statement on January 19 that Arons had paid $7,200 for the bankrupt stock whereas the files of the bankruptcy proceeding disclosed that only $3,000 had been paid by Arons for all the merchandise. It is strictly the function of the trial judge to determine the ultimate facts from a consideration of all the evidence submitted. His findings in the absence of prejudicial error will not be disturbed and they should be given the benefit of every reasonable inference fairly deducible from the evidence. Herbert's Laurel-Ventura, Inc., v. Laurel Ventura Holding Corporation, 58 Cal.App.2d 684, 690, 138 P.2d 43; Lorraine v. City of Los Angeles, 55 Cal.App.2d 27, 30, 130 P.2d 140.

[4, 5] Finally, it is contended that the court erred in excluding the testimony of Mrs. Reuss by whom appellants sought to prove a telephonic conversation with the Doctor, contradictory of the latter's previous testimony that he had not had such a conversation. The good lady could not say that she was familiar with or knew the voice of the Doctor. She had definitely talked with him some six years previously, but not thereafter to her knowledge. After the court had sustained an objection to her testimony no offer was made of what appellants intended to prove thereby. For want of such offer of proof to the trial court showing that the question called for material evidence the assignment cannot be considered on appeal. In re Estate of Parkinson, 190 Cal. 475, 476, 213 P. 259. Even though it had been error it was harmless. At a subsequent stage of the trial

Mrs. Reuss testified that she had never seen the Doctor prior to her appearance in court.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

76 Cal.App.2d 639

BURNS et al. v. BROWN et al.

Civ. 7114.

District Court of Appeal, Third District, California.

Oct. 29, 1946.

Rehearing Denied Nov. 26, 1946.

Hearing Denied Dec. 23, 1946.

1. Appeal and error 🔑907(2)

Where record before District Court of Appeal did not contain the evidence, court could not review the evidence to determine sufficiency thereof to sustain judgment, and all intendments were in favor of such judgment, and omitted evidence would be presumed to support the findings.

2. Appeal and error 🔑607(1)

Appellants who failed to make a motion for new trial within the period prescribed therefor cannot demand that their version of the evidence be incorporated in a settled statement as the authentic description of the proceedings, when the trial judge denies its authenticity. Code Civ.Proc. § 652; Rules on Appeal, rules 5–7, 12.

3. Appeal and error 🔑607(1)

Appellants could not complain that statements in their brief were omitted from record through no fault on their part, where appellants could have secured incorporation of such statements in record by timely motion for new trial. Code Civ.Proc. § 652; Rules on Appeal, rules 7, 12.

4. Appeal and error 🔑553(2)

Under rules on appeal, appellants could bring up reporter's transcript on failure to obtain a settled statement. Rules on Appeal, rules 5–7.

5. Appeal and error 🔑634

Where appellants failed to present a proper record, so that the points on appeal could not be adequately presented, the judgment would be affirmed.

Appeal from Superior Court, Del Norte County; Samuel L. Finley, Judge.

Action by Joseph J. Burns and Sidney M. Goodman against Eugene R. Brown and Beatrice Brown to quiet title to a mining claim. From a part of the judgment, the plaintiffs appeal.

Affirmed.

Prior opinion, 27 Cal.2d 631, 166 P.2d 1.

Abraham Glicksberg, of San Francisco, Thomas Cotter, of Eureka, and John L. Childs, of Crescent City, for appellants.

W. T. Miller, of Grants Pass, Or., and Paul A. Brunk, of Crescent City, for respondents.

ADAMS, Presiding Justice.

This appeal is now before this court on a record consisting of a Clerk's Transcript and what is entitled an Engrossed Statement on Appeal. The Clerk's Transcript consists of the complaint and an amendment thereto, a demurrer which was overruled, the answer of defendants, findings of fact and conclusions of law, judgment, notice of appeal, and "notice by appellants pursuant to rules 6 and 7."

From the engrossed narrative statement the following appears. The trial was had on February 3, 1943, and testimony was given by the parties and other witnesses. Thereafter, on April 23, 1943, the court filed a "Memorandum of Decision" which is set forth in the statement. Defendants proposed findings and conclusions which are also set forth. Plaintiffs proposed "other and different findings contrary to the findings as proposed by defendants and contrary to the memorandum of decision," but said proposed findings are not set forth. Thereafter, on or about August 15, 1943, appellants proposed additional findings which are set forth. At a hearing before the court subsequent to the trial it was orally stipulated by counsel for the parties that the property be surveyed under the direction of the court by a disinterested surveyor for the sole purpose of ascertaining the correct description of an overlap. It was also stipulated that, there being no disinterested surveyor in Del Norte County, Hal C. Acheson, a licensed surveyor from Humboldt County, be appointed to survey the overlap. In accordance with said stipulation the court made what is designated as "An Order, on Court's own motion, appointing Surveyor to determine exterior boundaries of premises claimed by the parties hereto." Said order is set forth. Thereafter, "pursuant to said oral stipulation and said order," Acheson and the trial judge proceeded to the claims and "under the direction of the court, solely from evidence produced at the trial," Acheson surveyed the overlap of the two claims on September 3, 1943. Acheson thereafter filed in the court a map showing the overlap, copy of same was furnished to counsel for both parties, and no objection to said map was made by either party. The court's findings and judgment are included in the engrossed statement. It then recites that judgment was entered January 5, notice was served on plaintiffs' attorneys on January 10, and on February 2d plaintiffs filed notice of intention to move for a new trial. Said motion was heard on February 28, but no ruling made thereon for the reason that it was not filed in time. The Order Settling Narrative Statement is dated September 19, 1944, and the engrossed statement, amended, was certified and approved November 6, 1944.

The substance of plaintiffs' complaint filed in the action was that they located a mining claim in Del Norte County on September 19, 1939, known as the "High Plateau"; that while they were in possession of same, defendants, "by force of arms and great violence," ousted plaintiffs from said claim and have ever since withheld possession from plaintiffs. Defendants in their answer denied that plaintiffs had located the said claim, alleged that the premises in controversy had been located by them and had been in their lawful possession long prior to November, 1939, and that plaintiffs had trespassed thereon.

The trial court found that both plaintiffs and defendants had made valid locations, but that there was an overlapping of the two claims, and that defendant Eugene R. Brown was the prior locator of the overlapping portion. The judgment quieted the plaintiffs' title to the location claimed by them except as to the overlap, and quieted defendants' title to their claim including the overlap. A blueprint of the survey of the overlap made by Acheson is attached to and made a part of the judgment.

Plaintiffs on February 25, 1944, filed notice of appeal from the portions of the judgment in favor of defendants, and on March 6, 1944, filed a notice "Pursuant to Rules 6 and 7," stating therein that they desired in "lieu of a reporter's transcript to pursue and perfect their appeal upon an agreed or settled statement as provided for in said Rules 6 and 7."

On August 7, 1944, defendants filed in this court a motion to dismiss plaintiffs' appeal on the ground that no notice to the clerk to prepare a transcript had been filed, and that no transcript was on file as required by rule 5 of the Rules on Appeal. In a written opposition to this motion to dismiss, appellants alleged that said motion was premature in that there was pending before the trial court the matter of settlement of a narrative statement on appeal "pursuant to Rule 7(b) of the Rules on Appeal." Said written opposition was accompanied by an affidavit of counsel for appellants which averred that an order settling a narrative statement pursuant to rule 7(b) had been made by the trial court, and that appellants intended to cause said statement to be engrossed and to prosecute their appeal regularly.

In view of the foregoing allegations of appellants a dismissal of the appeal was denied without prejudice, Burns v. Brown, 66 Cal.App.2d 142, 151 P.2d 899. On November 27, 1944, the engrossed statement was filed in this court. On December 4, 1944, appellants filed herein a petition to prove transcript under section 652 of the Code of Civil Procedure in which they averred that the statement settled by the trial court was not in accordance with the facts in that it did not include the judgment roll, the notice of appeal, the notice to the clerk of election to proceed by settled statement, the complaint, the answer, or any statement of the oral proceedings; and, particularly, that it excluded appellants' proposed statement of oral proceedings reflecting additional evidence taken out of court in connection with the survey of the overlap, which appellants contended was irregular and prejudicial to their rights; and that all of said omitted matters were "necessary and proper parts of the record on appeal, necessary and material to a determination of the appeal on the merits, and necessary and material to the presentation and substantiation of the points relied upon by appellants on appeal, and specified in their proposed statement of the case." This petition was denied by this court without opinion, whereupon appellants petitioned for a hearing in the Supreme Court, asserting in their petition therefor that "appellants' points on appeal cannot be adequately presented in the absence of a proper record in accordance with the facts."

The Supreme Court granted a hearing, and on February 8, 1946, rendered a decision which relieved appellants from default in failing to include in their notice of appeal a request for a clerk's transcript, and directed the trial court to include in the record on appeal the judgment roll, notice of appeal, and notice of election to proceed under rule 7 (Burns v. Brown, 27 Cal.2d 631, 166 P.2d 1). It held, however, that section 652 of the Code of Civil Procedure was not applicable to the preparation of a record under the new rules; that appellants, in effect, were asking an appellate court to settle a statement of the case when they had been unsuccessful in obtaining settlement of their statement by the trial court, but that the object of the settled statement procedure would be frustrated by such a procedure; that rule 12 of the Rules on Appeal does not authorize a reviewing court to take the place of the trial court and determine whether a proposed statement accurately and fairly reflects the proceedings in that court; and that having failed to make a timely motion for a new trial on the ground of asserted impropriety of the survey of the overlap, appellants cannot demand that their version of the proceedings surrounding the survey be incorporated in a settled statement as the authentic description of the proceedings when the trial judge denies its authenticity.

Subsequent to the decision of the Supreme Court there was filed in this court the clerk's transcript aforementioned, and the case is before us on that record and the engrossed statement as originally settled.

In their briefs before us on this appeal appellants contend that the parts of the judgment from which they appealed should be reversed for two reasons, the one that the evidence is insufficient to support the part respecting the overlap, and the other because of alleged irregularities in the proceedings of the court and the surveyor which operated to the prejudice of appellants.

[1] Since the record before us does not contain the evidence in the case obviously we cannot review same to determine the sufficiency of that evidence to sustain the judgment. All intendments are in favor of such judgment, and it will be presumed that the omitted evidence supports the findings Hughes v. De Mund, 7 Cal.2d 504, 505, 506, 61 P.2d 455; Loewenberg v. Schneider, 14 Cal.2d 305, 307, 93 P.2d 1014; Fares v. Morrison, 54 Cal.App.2d 773, 775, 129 P.2d 735; Klein v. Maddox, 59 Cal.App.2d 141, 144, 138 P.2d 28; 4 C.J.S., Appeal and Error, § 1172, pp. 1675–1677.

Regarding the alleged irregularities in the proceedings pertaining to the survey, appellants persist in stating that the order appointing the surveyor was made on the court's own motion, though the agreed statement as settled and signed by appellants' counsel states that it was orally stipulated by counsel for the parties that it be surveyed under the direction of the court by a disinterested surveyor for the purpose of ascertaining the correct description of the overlap, and that Hal C. Acheson be appointed to make such survey; and that the order of the court was made "in accordance with said stipulation." They also set forth in their brief a statement of their version of how said survey was conducted, saying that it was made in the presence of defendant Eugene R. Brown and one of his attorneys, and a third person, and in the absence of plaintiffs and their attorneys, and that the trial judge conferred with those present and with the surveyor; that the surveyor did not attempt to locate the alleged corners on the south side of defendants' claim, and was instructed by the trial judge not to attempt to do so. Appellants admit that no reference to the record can be made in support of these statements, but assert that they were "omitted from the record through no fault of appellants", and that they are supported by two affidavits, which affidavits are set forth in an appendix to the brief though nowhere made a part of the record on appeal. Appellants then state that if respondents challenge the truth of such statements appellants "invoke Rule 12(e) of the Rules on Appeal and ask this court to submit to the superior court for settlement the differences of the parties with respect to such omissions to the end that the superior court shall make the record conform to the truth."

[2] Substantially the same argument as this was made on appellants' prior motion to augment the record under rule 12. That argument was disposed of by the Supreme Court when it said that any such conflict could not be solved by an appellate court's authority under rule 12; that appellants' version of the proceedings surrounding the survey, and the affidavits supporting it would have constituted part of the record had appellants made a timely motion for a new trial; and that having failed to make such a motion within the period prescribed therefor, they cannot demand that their version be incorporated in a settled statement as the authentic description of the proceedings when the trial judge denies its authenticity.

[3, 4] As for appellants' assertion that the statements which they make in their brief were omitted from the record through no fault on their part, this is contradicted on the face of the record, for, as pointed out by the Supreme Court, they could have secured their incorporation by a timely motion for a new trial. And as for the record of the oral proceedings during the trial, appellants could have exercised the right given under the rules to bring up a reporter's transcript upon failure to obtain a settled statement, as was also pointed out by the Supreme Court, citing Averill v. Lincoln, 24 Cal.2d 761, 151 P.2d 119.

[5] We agree with appellants' assertion in their petition to the Supreme Court that their "points on appeal cannot be adequately presented in the absence of a proper record"; and since appellants have failed to present such a record the judgment must be and it is hereby affirmed.

PEEK and THOMPSON, JJ., concur.

29 Cal.2d 181

JONESI v. STATE BAR.

L.A. 19755.

Supreme Court of California, in Bank.
Nov. 1, 1946.

1. Attorney and client ⚿61

Evidence relating to rehabilitation, reformation and regeneration of attorney who had resigned from the State Bar as a condition of his probation after his conviction on grand theft charge, was sufficient to warrant reinstatement of attorney.

2. Attorney and client ⚿60, 61

An attorney's resignation with prejudice to readmission at a future time had no greater effect than a disbarment would have had on his right to apply for readmission, and did not prevent attorney from thereafter applying for reinstatement to the bar.

◆

Proceeding by Joseph J. Jonesi, petitioner, against State Bar of California, to review the action of the Board of Governors of the State Bar declining to recommend the petitioner for readmission to practice law.

Petitioner ordered reinstated.

Joseph J. Jonesi, of Los Angeles, in pro. per.

Charles E. McDowell and Jerold E. Weil, both of Los Angeles, for respondent.

PER CURIAM.

By this proceeding, petitioner seeks a review of the action of the Board of Governors of The State Bar declining to recommend him for readmission to practice law.

Petitioner, who was admitted to practice in 1933, was charged with grand theft in October, 1938. He was convicted of the charge and on February 8, 1939, was placed on probation for five years on condition that he serve 90 days in the county jail, make restitution of the embezzled moneys and follow the instructions of the court and the probation officer. The court also orally imposed the further condition that petitioner resign from The State Bar. At this time, two disciplinary proceedings, relating to other matters, were also pending. These resulted in recommendations by a local administrative committee that petitioner be suspended for one year and that he be disbarred, but no further action was taken. When he presented his resignation to The State Bar, he was informed that the Board of Governors would not recommend acceptance unless the resignation recited the pendency of the disciplinary proceedings and was with prejudice to readmission at a future time. Thereafter, for the purpose of complying with the trial court's direction, he filed a resignation with prejudice. Upon recommendation of The State Bar, the resignation was accepted by an order which recited that petitioner's right "to hereafter apply for readmission to the practice of law herein is hereby terminated." On January 27, 1944, the trial court terminated the probation, set aside the verdict of guilty and dismissed the cause under section 1203.4 of the Penal Code.

Subsequently, The State Bar declined to entertain petitioner's application for reinstatement "because of the terms of his resignation and of the action of the Supreme Court thereon." Thereafter, The State Bar was directed by this court to consider and determine the application on the merits, and the hearings commenced on November 15, 1945. From the record it appears that, following his resignation, he did various odd jobs until about August, 1939, when he obtained employment at $100 a month with Romer, O'Connor & Co., a corporation doing business as a licensed and bonded collection agency and insurance adjuster. From time to time his wages were increased and his duties expanded until he became manager of the Los Angeles office. In this position, he "handled a great deal of money, a great deal of responsibility, and also [had] proven himself as a very capable man, a very honest man, and extremely loyal." The president of the company and its secretary, both of whom are attorneys, testified to their complete confidence in him and in his rehabilitation. Similar testimony was given by three other attorneys who had known him for six or seven years. By other testimony, it was shown that he had repaid the money involved in the grand theft charge, and all other debts owing by him, that following his conviction his wife divorced him and secured an order for the support of their minor child, that he paid the support money promptly each month and for a considerable period voluntarily increased the monthly amount, and that they subsequently remarried.

No evidence was introduced to controvert the showing of present rehabilitation made by petitioner.

The local administrative committee, which heard the evidence, found that petitioner had rehabilitated himself to a satisfactory degree, and that he possessed the requisite moral qualifications, and unanimously recommended his readmission to practice. This recommendation was approved by the representative of the Los Angeles Bar Association who heard a majority of the witnesses testify and who also made an independent investigation.

The Board of Governors found that petitioner's resignation with prejudice was his free and voluntary act and, by vote of nine to three, that he was not sufficiently rehabilitated to warrant his reinstatement. The board declined to recommend reinstatement. It appears from the record, however, that at least three of the members were influenced by a belief that petitioner was precluded from reinstatement by the terms of his resignation.

[1] The respondent argues in support of its finding of insufficient rehabilitation that the things petitioner has done are "commendable, but far short of the requirements to show complete rehabilitation," and that "It is perfectly true that since his conviction and probation in this matter petitioner has apparently done nothing worthy of censure. However, the period of time since the end of the period of probation is not long. * * *" With this argument we cannot agree. In view of the showing made by petitioner, including the testimony of his employers who had ample opportunity to observe his conduct and appraise his character, and the recommendations of members of the bar who had frequent and fairly intimate contact with him, and in view of the complete absence of any evidence tending to controvert the showing of present rehabilitation, it appears that petitioner has sustained the burden of proving such reformation and regeneration as warrants his reinstatement.

[2] The respondent's further argument is that petitioner's resignation was voluntary and that his affirmative act in resigning with prejudice operates to deprive him of the right to secure readmission, despite the completeness of his rehabilitation. However, it cannot be denied that he would be entitled to apply for reinstatement if, instead of complying with the trial court's direction in granting probation, he had refused to resign with prejudice and had been disbarred. We cannot agree that his resignation, even if deemed to be "voluntary," has any other or greater effect than a disbarment would have on his right to apply for readmission to practice law, or that any such effect is to be given to the order of this court accepting the resignation with prejudice.

It is therefore ordered that petitioner be reinstated as a member of The State Bar of California upon payment of the fees and taking the oath required by law.

29 Cal.2d 164

PEOPLE v. OYAMA et al.

L. A. 19533.

Supreme Court of California, in Bank.

Oct. 31, 1946.

Rehearing Denied Nov. 25, 1946.

1. Aliens 🔑10
Property 🔑8, 12

A state has the right to regulate the tenure and disposition of realty within its boundaries, and also has the power, in the absence of a treaty to the contrary, to forbid the taking or holding of property within its limits by aliens. Const. art. 1, § 17.

2. Aliens 🔑10

The "clear and present danger" doctrine as a basis for restricting the liberty of the individual applies to fundamental liberties and does not restrict the authority of the state, under its police power, to limit by statute such as the Alien Land Law the rights of aliens in regard to realty situated within the borders of the state, and such a statute is sufficient if a rational basis is found for the classification. Gen. Laws Act, 261, § 1 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Clear and Present Danger".

3. Aliens 🔑10
Constitutional law 🔑212, 278(1)

The Alien Land Law, as applied to Japanese aliens, does not violate the due process clause or equal protection clause of the federal Constitution. Gen.Laws, Act 261, § 1 et seq.; U.S.C.A.Const. Amend. 14.

4. Aliens 🔑10
Constitutional law 🔑60

The Alien Land Law does not unconstitutionally delegate legislative authority because of the fact that the state Legislature has set up eligibility to citizenship under the laws of the United States as a primary standard. Gen.Laws, Act 261, § 1 et seq.

5. Constitutional law 🔑42

Where realty escheated to the state because of deficiencies existing in Japanese alien, so that alien's son, who was a citizen, acquired nothing by the conveyance, any constitutional guaranties to which the son was entitled could not properly be considered. Gen.Laws, Act 261, § 1 et seq.

6. Escheat 🔑6

In proceeding to escheat land on ground of a violation of the Alien Land Law by Japanese alien, evidence supported findings that Alien Land Law was violated by alien who used the name of his son, who was a citizen, as a subterfuge for the purpose of evading the Alien Land Law. Gen.Laws, Act 261, § 1 et seq.

7. Aliens 🔑12(2)

The amendment to the Naturalization Act permitting naturalization of every person who honorably served in the armed forces of the United States during World War II did not make eligible to citizenship every Japanese national, and therefore did not render the Alien Land Law inapplicable to Japanese national who had not served in the armed forces of the United States. Nationality Act of 1940, § 701, as amended, 8 U.S.C.A. § 1001; Gen.Laws, Act 261, § 1 et seq.

8. Aliens 🔑12(4)

Where land of Japanese alien escheated to the state under the Alien Land Law in 1934 and in 1937, 1942 amendment to the Naturalization Act permitting naturalization of every person who honorably served in the armed forces of the United States during World War II had no effect on the title of the land. Nationality Act of 1940, § 701, as amended, 8 U.S.C.A. § 1001; Gen.Laws, Act 261.

9. Limitation of actions 🔑5(3)

The statute providing that civil actions can only be commenced within the periods prescribed in statute dealing with limitations after cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute, has no application to a proceeding to escheat land under the Alien Land Law in view of provisions of the law that time shall not bar the right to invoke its provisions. Gen.Laws, Act 261, §§ 1 et seq., 8.5; St.1945, p. 2177, § 2, Code Civ.Proc. §§ 312, 315 et seq.

10. Escheat 🔑6

In proceeding to escheat land of Japanese alien under the Alien Land Law, defense of laches was not applicable where there was no evidence tending to prove that any injury resulted to defendants by reason of lapse of time that occurred before commencement of the proceeding. Gen. Laws, Act 261, § 1 et seq.

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Appeal from Superior Court, San Diego County; Joe L. Shell, Judge.

Proceeding to escheat land by the People against Fred Y. Oyama, a minor, and others. From a judgment in favor of the People, the defendants appeal.

Judgment affirmed.

Wirin, Maeno & Tietz, of Los Angeles, Saburo Kido, of Salt Lake City, Utah, and A. L. Wirin, of Los Angeles, for appellants.

Daniel G. Marshall, of Los Angeles, Sherwood Green, of Madera, Marlin H. Shirley, of Whittier, Wayne M. Collins, of San Francisco, Arthur Garfield Hays and Osmond K. Fraenkel, both of New York City, and James C. Purcell and William E. Ferriter, both of San Francisco, amici curiae on behalf of appellants.

Robert W. Kenny, Atty. Gen., Everett W. Mattoon, Deputy Atty. Gen., and Thomas Whelan, Dist. Atty., and Duane J. Carnes, Deputy Dist. Atty., for respondent.

Chester E. Watson, Dist. Atty., and Robert P. Sullivan, Chief Deputy Dist. Atty., both of San Joaquin, amici curiae on behalf of respondent.

EDMONDS, Justice.

Principally upon the ground that the United States Supreme Court has changed the constitutional tests applicable to state legislation such as the Alien Land Law, Alien Property Initiative Act of 1920, Stats. 1921, p. lxxxiii, as amended, 1 Deering's Gen.Laws, Act 261, the validity of that statute is again challenged. Another question presented for decision concerns the effect of the recent amendment of the federal law which allows, under certain circumstances, a member of the Japanese race to become a citizen of the United States.

In the petition filed by the attorney general, he asserted that certain real property, by reason of its conveyance in violation of the Alien Land Law, has escheated to the state. Two causes of action were pleaded. In the first one, it was alleged that Kajiro Oyama, Kohide Oyama, formerly Kohide Kushino, and Ririchi Kushino, are of the Japanese race, natives of the Empire of Japan and citizens and subjects of that country and, by reason thereof, are not eligible to citizenship under the laws of the United States; that Fred Y. Oyama is the son of Kajiro and Kohide Oyama and is of the Japanese race but was born in California in 1928; and that June Kushino also is of the Japanese race and was born in California in 1921. There has never been a treaty permitting a native of Japan to acquire an interest in the agricultural land of this country. Since 1935, by appointment of the Superior Court of the State of California, in and for the County of San Diego, Kajiro Oyama has been the duly qualified guardian of the person and estate of Fred Y. Oyama, a minor. June Kushino attained the age of 21 years in 1942 and during her minority, Ririchi Kushino was the guardian of her person and estate.

In 1934, the petition continued, Kajiro Oyama and Kohide Oyama purchased certain agricultural land in San Diego County and a purported conveyance of it was made by one Yonezo Oyama to Fred Y. Oyama. The purchase price of $4,000 was paid to Yonezo Oyama by Kajiro and Kohide Oyama. Upon the execution and delivery of this purported deed, Kajiro and Kohide Oyama entered into the possession of the property and have ever since occupied and cultivated it as their own, and have had in their own right the beneficial use and enjoyment of the lands for agricultural purposes. The purchase of the property and the taking of the deed in the name of Fred Y. Oyama was a mere subterfuge, a fraud upon the People of the State of California and a violation of the Alien Land Law of California. Moreover, these persons acted willfully, knowingly and with intent to obtain the ownership and use of the agricultural lands for their own use.

Other allegations of this count were that Kajiro Oyama failed to render any account to the superior court for his receipts and expenditures as guardian, and has not filed any annual or other account or report with the Secretary of State of California, as required by section 5 of the Alien Land Law. No account or report has been filed by the guardian with the County Clerk of San Diego County or served upon the district attorney, but in conducting business affecting the land in controversy, Kajiro Oyama used the name "Fred Oyama" and "Y. Oyama," and maintained checking accounts in each of those names for the purpose of evading and violating the Alien Land Law.

The second cause of action incorporated some of the allegations of the first count, including those having to do with the race, nativity, citizenship and status of the parties. It then pleaded that in 1937, the Superior Court of the State of California, in and for the County of San Diego, in the matter of the Guardianship of June Kushino, made an order confirming the sale of certain described land in that county from her to Fred Y. Oyama for a purchase price of $1,500. Upon the making and recording of that order, Kajiro and Kohide Oyama entered into possession of the property and have since occupied and used it as their own and have had in their own right the beneficial use of the land for agricultural purposes. All of these acts were done by Kajiro and Kohide Oyama, willfully, knowingly and with intent to violate the Alien Land Law of the State of California. The prayer of the petition was that the land conveyed to Fred Y. Oyama be decreed to have escheated to the state as of the date of the respective deeds; also that, as against the state, each of the defendants be forever barred from asserting any claim or title to either parcel.

The defendants demurred to the petition upon the grounds that it did not state facts sufficient to state a cause of action, that the court lacked jurisdiction, that the California Alien Land Law is unconstitutional, and that the causes of action are barred by the statutes of limitations. The demurrer was overruled.

By answer, the defendants admitted the race and Japanese citizenship of Kajiro Oyama, Kohide Oyama, and Ririchi Kushino, but denied that, by reason thereof, they are not eligible to citizenship under the laws of the United States. They admitted the pleaded facts as to the birth and race of Fred Y. Oyama and June Kushino, and also the allegations concerning the guardianship proceedings. But the answer denied that Kajiro and Kohide Oyama purchased the property described in the complaint and asserted that Kajiro Oyama provided the money to purchase the two parcels of property as a gift to his son. Each of the transactions was made in good faith and for the purpose of acquiring for their son a means of earning a livelihood and for the further purpose of guarding and husbanding the gift for that purpose. The property described in the complaint is agricultural land, but Kajiro and Kohide Oyama have not occupied, used or cultivated it as their own nor had the beneficial use of it. As an affirmative defense, the defendants alleged that the state should not recover because of laches.

Upon the trial of these issues, John C. Kurfurst was the only witness. He testified that he had known the Oyama and Kushino families since about 1932. When the Japanese were evacuated from the Pacific coast, he rented the land in controversy and, by two checks, paid the rent to Fred Oyama. These checks were returned to him endorsed in that name. Kurfurst had never heard the name Kajiro Oyama; he had always known the father of the family as "Fred" and stated that "everybody else called him Fred." But he had received a letter signed "Fred Oyama" notifying him that the property was being turned over to a Mr. Kelly although Kurfurst had never heard the writer refer to himself by that name.

Other testimony of Kurfurst was that at one time Oyama, senior, said: "Some day the boy will have a good piece of property because that is going to be valuable." However, he admitted that in a letter which he wrote, in referring to "Fred Yoshihiro Oyama," he meant the son and not the father. He knew that the property belonged to the boy, Fred Oyama, and to June Kushino; also that the father was running the boy's business. But he did not know whether the checks were made out to the "old man or the young fellow" and he did not know "whether the boy signed it or Mr. Oyama."

Evidence of official records showed that no reports pursuant to the requirements of the Alien Land Law had been filed by the defendants. The state also proved that in the guardianship proceeding, on two occasions, the father of Fred Y. Oyama, as guardian, applied for leave of court to borrow money and to mortgage the property as security for the indebtedness. Both applications were granted.

Upon this evidence the court found all of the facts alleged in the petition to be true. The conclusions of law drawn from these facts were that, as of 1934 and 1937, respectively, title to the two parcels of real property in question was vested in and did escheat to the State of California and the defendants were perpetually enjoined from setting up or making any claim to the land. The appeal is from that judgment.

The defendants contend that the Alien Land Law is unconstitutional because enacted for the purpose of and administered in a manner to discriminate against persons solely because of race. It is urged that as to both Kajiro Oyama, an alien, and Fred Oyama, a citizen, the statute denies due process of law as guaranteed by article I, section 13, of the California Constitution, and violates article I, section 1, of the same Constitution which guarantees to all men the right to enjoy life, liberty and property. The point is also urged that the Alien Land Law constitutes an unlawful delegation of legislative power to the federal government, and that the phrase, "ineligible to citizenship" is vague, indefinite and constitutes a denial of due process.

As to Fred Oyama, a citizen, it is argued that the Alien Land Law violates the mandate of the California Constitution that no citizen or class of citizens shall be "granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." Const. art. I, § 21. Considering the statute in its application to both Kajiro and Fred Oyama, the defendants continue, it deprives them of property without due process of law and denies them equal protection of the laws and deprives Fred Oyama of privileges and immunities as a citizen, all in violation of the Fourteenth Amendment to the Constitution of the United States. Counsel also contend that, although the Alien Land Law has been upheld, the United States Supreme Court has changed the constitutional test applicable to state legislation discriminating against a group and its members because of race from the "rational basis" doctrine to that of "clear and present danger." A decision approving a statute does not bar a contrary determination at another time and under a different set of circumstances. Furthermore, by virtue of a recent amendment to the Naturalization Act, persons of Japanese birth no longer are ineligible to citizenship solely because of race, and the Alien Land Law is inapplicable to Kajiro Oyama because, if he joins the Army, he may become a citizen.

The defendants also rely upon the statutes of limitations. As they state the rights of the parties, by section 312 of the Code of Civil Procedure all actions are barred by some statute of limitations and the state's claims are barred by the 1-year, the 3-year, the 4-year and the 10-year statutes of limitations. More specifically, the present suit comes within section 340 of the Code of Civil Procedure. Section 338, subdivision 1 of the same code also is applicable because this is an "action upon a liability created by statute, other than a penalty or forfeiture." Moreover, section 338, subdivision 4, of the Code of Civil Procedure bars the remedy since the effect of the judgment is that the defendants acted fraudulently. Section 343 also applies, and the broad provisions of section 315 of the same code include an escheat action. In conclusion, it is contended that the doctrine of laches is applicable to each cause of action. Two amicus curiae briefs filed on behalf of appellants develop in more detail the principal contentions in regard to the bar of the statutes of limitations.

The attorney general stands upon the decision of this court and that of the United States Supreme Court upholding the constitutionality of the Alien Land Law as a proper exercise of the state's police power. It has been the invariable policy of the United States, he declares, to discriminate against aliens by racial classification for purposes of immigration and naturalization. There is a rational basis for discrimination, and the distinction between eligible and ineligible aliens is made by federal, not state, statutes. Moreover, the test of a "clear and present danger" is limited to fundamental civil liberties and not to property rights and no evidence was presented establishing unconstitutional discrimination. The recent amendment to the naturalization laws does not abolish ineligibility to citizenship of aliens regardless of race, as the defendants contend, but only extends the privilege of naturalization to those serving honorably in the armed forces during World War II. Furthermore, since title to the property vested in the State of California long prior to the act of Congress attempted to be relied upon by the defendants, the later legislation can have no effect upon the state's title.

In regard to the statutes of limitations, the state contends that section 340 of the Code of Civil Procedure is not applicable to the recovery of real property and there is neither a forfeiture nor the imposition of a penalty under the Alien Land Law. Section 338, subdivision 1, does not apply, because no question of "liability" is involved. Subdivision 4 of the same section deals with actions based upon fraud, which is only an incidental issue in the present suit; the gist of the action is that the state claims to have title to land and the defendants are asserting unfounded claims to it. As to section 343 of the Code of Civil Procedure, the bar of that statute was not raised by the pleadings and it has no application to an escheat proceeding.

Considering section 315 of the Code of Civil Procedure, the attorney general takes the position that although there is no express language in the Alien Land Law which excepts its requirements from the operation of other provisions of law, the plain policy of the enactment is wholly inconsistent with the application of a statute of limitations and the Legislature has so declared in a 1945 amendment to the statute. And because there is no showing of any injury by the delay, the doctrine of laches is not applicable, and the finding upon that issue is beyond the reach of an appellate court. The amicus curiae brief filed upon behalf of the state presents substantially the same arguments as those advanced by the attorney general.

The Alien Land Law legislates concerning the right to own land in this state. The scope of the statute is much broader than the acquisition and ownership of land; it includes the right to "acquire, possess, enjoy, use, cultivate, occupy, transfer, transmit and inherit real property, * * * [or to] * * * have in whole or in part the beneficial use thereof." §§ 1, 2. This right is given to citizens of the United States and to all aliens eligible to become such; aliens who are not eligible to citizenship under the laws of the United States can enjoy the right only in the manner and to the extent and for the purposes prescribed by any treaty existing at the time of the enactment of the statute between the government of the United States and the nation or country of which the alien is a citizen or subject. §§ 1, 2. Section 4 of the statute, as originally enacted, denied to an alien parent the right to become the guardian of the estate of his native-born child and was held invalid. Estate of Yano, 188 Cal. 645, 206 P. 995. However, in 1943, the Legislature amended that section, allowing the appointment of an alien guardian but preventing such guardian from enjoying, either directly or indirectly, the beneficial use of land owned by the minor. The new provision requires the guardian to make an annual report to the court showing all moneys expended and received, and to serve a copy of such report upon the district attorney of the county, together with notice of the hearing of the report. Failure to do so renders the guardian punishable by fine, imprisonment, or both.

Section 5 directs the guardian to file in the office of the secretary of state, and in the office of the county clerk of each county in which any property is situated, an annual report describing "property, * * * held by him * * * on behalf of such alien or minor; * * * the date when each item of such property came into his possession or control; an itemized account of all such expenditures, investments, rents, issues and profits in respect to the administration and control of such property with particular reference to holdings of corporate stock and leases, * * * and other agreements in respect to land and the handling or sale of products thereof." Violation of this section is punishable by imprisonment, fine or both.

Section 7 of the statute, as amended in 1923, states that real property acquired in violation of the act by an ineligible alien "shall escheat as of the date of such acquiring, to, and become and remain the property of the state of California." Section 8.5, added in 1945, provides: "No statute of limitations shall apply or operate as a bar to any escheat action or proceeding now pending or hereafter commenced pursuant to the provisions of this act." As a part of the same enactment, the Legislature declared that it "does not constitute a change in, but is declaratory of, the preexisting law." Stats.1945, ch. 1136, p. 2177, § 2.

By other provisions of the legislation, where the property interest attempted to be transferred is of such character that the ineligible alien "is inhibited from acquiring, possessing, enjoying, using, cultivating, occupying, transferring, transmitting or inheriting it," and if the conveyance is made "with intent to prevent, evade or avoid escheat," the "transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed as sought to be conveyed shall escheat to the state as of the date of such transfer." § 9. By the terms of the same section, a prima facie presumption that the conveyance is made with such intent shall arise upon proof of: "(a) The taking of the property in the name of a person other than the persons mentioned in section two hereof if the consideration is paid or agreed or understood to be paid by an alien mentioned in section two hereof, * * *."

The determination as to eligibility to citizenship rests exclusively with the federal government and is fixed by Congress in the naturalization laws. Whomever it endows with the right to become a citizen may acquire and own land in California.

Eligibility has been extended to "white persons, persons of African nativity or descent, descendants of races indigenous to the Western Hemisphere, and Chinese persons or persons of Chinese descent" and includes native-born Filipinos having honorable service in our armed forces and former citizens who are otherwise eligible. 57 Stat. 601, 8 U.S.C.A. § 703. In 1942, the Naturalization Act was amended, 56 Stat. 182, 8 U.S.C.A. § 1001, to extend the privilege of naturalization to include "any person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and who shall have been at the time of his enlistment or induction a resident thereof and who (a) was lawfully admitted into the United States, including its Territories and possessions, or (b) having entered the United States * * * prior to September 1, 1943, being unable to establish lawful admission into the United States serves honorably in such forces beyond the continental limits of the United States or has so served * * *."

[1] The state has the right to regulate the tenure and disposition of real property within its boundaries. Mott v. Cline, 200 Cal. 434, 253 P. 718; Blythe v. Hinckley, 127 Cal. 431, 59 P. 787; Terrace v. Thompson, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255; United States v. Fox, 94 U.S. 315, 24 L.Ed. 192. It also has the power, in the absence of a treaty to the contrary, to forbid the taking or holding of property within its limits by aliens (Mott v. Cline, supra, 200 Cal. at page 447, 253 P. at page 724; In re Y. Akado, 188 Cal. 739, 743, 207 P. 245; Blythe v. Hinckley, supra, 127 Cal. at page 436, 59 P. at page 788; Terrace v. Thompson, supra, 263 U.S. at page 217, 44 S.Ct. at page 18, 68 L.Ed. 255), and our Constitution leaves to the Legislature this power with regard to all aliens ineligible to citizenship. Cal. Const. art. I, § 17; In re Y. Akado, supra, 188 Cal. at page 743, 207 P. at page 246.

The Alien Land Law expressly honors every right vouchsafed by a treaty between this and another nation. In all cases where the right to own land in the United States by citizens of a foreign nation is granted by treaty, such right is recognized and fully protected. § 2. "The treaty between the United States and Japan provides that citizens of Japan residing in the United States may lease land for residential and commercial purposes, but it contains no provision authorizing an alien of the

Japanese race to lease or acquire land for agricultural purposes. Consequently the Initiative Alien Law * * * prohibits the acquisition by such alien of any agricultural land situated in this state." In re Y. Akado, supra, 188 Cal. at page 740, 207 P. at page 245; see, also, Terrace v. Thompson, supra, 263 U.S. at page 223, 44 S.Ct. at page 20, 68 L.Ed. 255; Porterfield v. Webb, 263 U.S. 225, 232, 44 S.Ct. 21, 68 L.Ed. 278. The abrogation of this treaty on January 26, 1940, has no effect upon the rights of the parties in the present litigation.

Shortly after the People enacted the Alien Land Law, a suit was brought to enjoin the attorney general from enforcing its provisions. The plaintiffs complained that they had been "unlawfully coerced by * * * threats of prosecution from entering into * * * agreements [pertaining to the planting, cultivating, and farming of certain agricultural lands] and * * * thereby deprived of their property without due process of law and * * * denied equal protection of the law in contravention to the fourteenth amendment of the federal constitution." It was held that the legislation does not "offend any clause or provision of the state or federal constitution or violate any treaty obligation or right existing between this country and the empire of Japan." As to the validity of certain cropping contracts, the court said, quoting from Webb v. O'Brien, 263 U.S. 313, 44 S.Ct. 112, 68 L.Ed. 318: "Conceivably, by the use of such contract, the population living on and cultivating the farm lands might come to be made up largely of ineligible aliens. The allegiance of the farmers to the state directly affects its strength and safety. Terrace et al. v. Thompson, supra. We think it within the power of the state to deny to ineligible aliens the privilege so to use agricultural lands within its borders." Porterfield v. Webb, 195 Cal. 71, 231 P. 554, 558.

The Webb v. O'Brien decision, it was pointed out in this case, "rests largely upon broad principles of national safety and public welfare. Unquestionably the farming of lands by ineligible aliens would give them a use, occupancy, and benefit of agricultural lands which in effect would amount to a deprivation of its use, enjoyment, and occupancy by the citizen. Any other theory would be incompatible with the occupation of husbandry. * * * Racial distinctions may furnish legitimate ground for classifications under some conditions of social or governmental necessities." 195 Cal. at page 82, 231 P. at page 558.

In the case of Mott v. Cline, supra, the owner-lessor challenged the validity of a certain option provision in a lease, the contention being that the lessee was an ineligible alien. As to the constitutionality of the statute, the court said: "It has been firmly settled by the decisions of both federal and state courts * * * that the adoption of the alien land acts was a lawful exercise of the police power. In fact, it is the exercise of that power in its highest and truest sense. The ownership of the soil by persons morally bound by obligations of citizenship is vital to the political existence of a state. It directly affects its welfare and safety." 200 Cal. at page 447, 253 P. at page 724.

The status of aliens in connection with the ownership of real property was also considered by the United States Supreme Court in Terrace v. Thompson, supra. The court there pointed out that [263 U.S. 197, 44 S.Ct. 20] "two classes of aliens inevitably result from the naturalization laws —those who may and those who may not become citizens. The rule established by Congress on this subject, in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership as defined in the act." Considering the contention that an alien land law similar to our own enacted by the State of Washington was repugnant to the due process clause and the equal protection clause of the Fourteenth Amendment, the court declared: "State legislation applying alike and equally to all aliens, withholding from them the right to own land, cannot be said to be capricious or to amount to an arbitrary deprivation of liberty or property, or to transgress the due process clause."

Upon the subject of equal protection the court held that the classification was reasonable, saying that the rule established by Congress on the subject of naturalization "in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership as defined in the act." The broad basis of the decision is that "one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries." In another case, the California statute was upheld upon these grounds, with the comment that both acts were within the police power of the respective states. Porterfield v. Webb, 263 U.S. 225, 44 S.Ct. 21, 68 L.Ed. 278. Other federal court cases in which the constitutionality of the Alien Land Law of California has been considered are: Morrison v. People of State of California, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664, reversing People v. Morrison, 218 Cal. 287, 22 P.2d 718, and declaring section 9a of the Alien Land Law unconstitutional; Cockrill v. California, 268 U.S. 258, 45 S.Ct. 490, 69 L.Ed. 944 (sustaining constitutionality of the presumption set forth in section 9, subd. (a), of the Alien Land Law); Frick v. Webb, 263 U.S. 326, 44 S.Ct. 115, 68 L.Ed. 323.

The defendants rely upon West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, 147 A.L.R. 674, and Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430, for the proposition that modern doctrines of constitutional law extend the protection of the First Amendment and the Fourteenth Amendment to all cases where the Legislature cannot justifiably find a "clear and present danger" as a basis for restricting the liberty of the individual. However, Justice Jackson, speaking for the majority in the first of these cases, clearly distinguished between the test to be used when dealing with fundamental liberties, which include freedoms of speech, press, assembly, and worship, and other rights. He said: "In weighing arguments of the parties, it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case." 319 U.S. at page 639, 63 S.Ct. at page 1186, 87 L.Ed. 1628, 147 A.L.R. 674. And in the more recent case of Thomas v. Collins, supra [323 U.S. 516, 65 S.Ct. 321] Justice Rutledge, speaking for the majority, made clear that the "clear and present danger" test will be applied only to those fundamental liberties protected by the First Amendment. See, also, Asbury Hospital v. Cass County, 326 U.S. 207, 66 S.Ct. 61; People of State of California v. Thompson, 313 U.S. 109, 61 S.Ct. 930, 85 L.Ed. 1219; Clark v. Paul Gray, Inc., 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001; Hendrick v. Maryland, 235 U.S. 610, 35 S.Ct. 140, 59 L.Ed. 385; 33 Cal.L.Rev. 319.

[2, 3] These cases and the decisions of the United States Supreme Court previously cited, including Terrace v. Thompson, supra, and Porterfield v. Webb, supra, limit the test of a "clear and present danger" to fundamental liberties and do not restrict the authority of the state, under its police power, to limit the rights of aliens in regard to real property situated within

its borders. It is sufficient if a rational basis is found for the classification. And considering the Alien Land Law in connection with the record now before the court, there is no evidence that the statute was unconstitutionally applied or administered.

[4] The Legislature of this state has set up eligibility to citizenship as a primary standard, and because the determination of some fact or condition incorporated in this primary standard rests elsewhere than in the Legislature, or that this requirement is measured by another standard not under the control of the state and which may be subject to change, does not amount to an unconstitutional delegation of legislative authority. Ex parte Gerino, 143 Cal. 412, 77 P. 166, 66 L.R.A. 249; In re Lasswell, 1 Cal.App.2d 183, 36 P.2d 678, and cases cited therein; People v. Goldfogle, 242 N.Y. 277, 151 N.E. 452. This court and the United States Supreme Court in the cited cases have held that the use of the phrase, "ineligible to citizenship" does not constitute a denial of due process.

[5] The property in question passed to the State of California by reason of deficiencies existing in the ineligible alien, and not in the citizen Oyama. The citizen is not denied any constitutional guarantees because an ineligible alien, for the purpose of evading the Alien Land Law, attempted to pass title to him. It is the deficiency of the alien father and not of the citizen son which is the controlling factor; therefore any constitutional guarantees to which the citizen Oyama is entitled may not properly be considered, for the deficiency in a person other than himself is the cause for the escheat. Property which the citizen never had he could not lose, and as the land escheated to the state instanter, he acquired nothing by the conveyance and the Alien Land Law took nothing from him.

[6] The trial court's findings in regard to the violation of the statute are fully supported by the evidence. The inferences to be drawn from the evidence that the real property was conveyed to the son, thereby putting it beyond the power of the father to deal with the property directly, the father's failure to file the reports required of a guardian, the unexplained failure of the father, or any one of the defendants, to offer himself as a witness, and the presumption created by section 9 of the Alien Land Law, are ample in this regard. Indeed, this evidence convincingly points to the conclusion that the minor son had no interest in the property, his name being used only as a subterfuge for the purpose of evading the Alien Land Law.

[7] The defendants also urge that by the 1942 amendment to the Naturalization Act, 56 Stat. 182, 8 U.S.C.A. § 1001, permitting the naturalization of every person who honorably served in the armed forces of the United States during the present war, all ineligibility to naturalization based upon race was removed. But the clear purpose of Congress in granting that privilege to those persons who could not otherwise become citizens was to reward military service. Certainly the statute does not make eligible to citizenship every Japanese national, and those who take advantage of its provisions gain that status because of work well done for our country and not by reason of having the qualifications to join its armed forces. Following World War I, the same privilege was extended to Filipinos, 40 Stat. 542, 8 U.S.C.A. § 388, and it was held that the amendment did not eliminate the basic requirements for naturalization; "as to those not possessing such qualifications, the distinction based on color and race was not eliminated." Roque Espiritu De La Ysla v. United States, 9 Cir., 77 F.2d 988, 989, certiorari denied 296 U.S. 575, 56 S.Ct. 138, 80 L.Ed. 406. The statute relied upon by the defendants in the present case has the same effect.

[8] Another complete answer to the contention of the defendants in regard to the changes in the requirements for naturalization is that, under the Alien Land Law in 1934 the land described in the first count of the complaint automatically escheated to the state, and as to the property conveyed by the estate of June Kushino, escheat occurred three years later. Title

vested in the state upon these dates, and the later legislation has no effect upon that title.

[9] The defendants claim that the present proceeding is barred by the provisions of one or more of the statutes of limitations generally applicable to civil actions. Primarily, this defense is based upon section 312 of the Code of Civil Procedure which provides: "Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute." But the plain meaning of this section is that the particular statutes of limitations which are found in section 315 et seq., of the Code of Civil Procedure may be invoked except as to an action authorized by legislation which includes a provision limiting the time within which it may be commenced. And the "different limitation" mentioned in section 312 clearly should be construed to include no limitation as to an action commenced under a statute which specifies that time shall not bar the right to invoke its provisions.

The clear and unmistakable purpose of the Alien Land Law at all times since it was enacted by the People as an initiative measure has been to place the ownership of real property in this state beyond the reach of an alien ineligible to citizenship. Not only is such an alien prohibited from acquiring real property, or any interest therein; the statute expressly provides that he shall not possess, enjoy, use, cultivate or occupy land. He may not convey real property, or any interest therein, or have, in whole or in part, the beneficial use of land, and any attempted transfer to an ineligible alien is void as to the state. These provisions are entirely inconsistent with a statute of limitations; they state broad principles of public policy relating to the ownership of land and declare that any conveyance made in violation of the mandate of the People shall be void.

The Legislature of 1945 made this construction certain. It declared: "No statute of limitations shall apply or operate as a bar to any escheat action or proceeding now pending or hereafter commenced pursuant to the provisions" of the Alien Land Law. § 8.5 "The amendment made by this act does not constitute a change in, but is declaratory of, the preexisting law." Stats. 1945, ch. 1136, p. 2177, § 2. It is entirely proper for the Legislature to clarify the provisions of a statute in this manner, and for the court to follow that construction. Standard Oil Co. v. Johnson, 24 Cal.2d 40, 48, 147 P.2d 577; Union League Club v. Johnson, 18 Cal.2d 275, 278, 279, 115 P.2d 425.

[10] In regard to the special defense of laches, the court found that the action was not barred upon that ground. The record shows that no evidence was presented tending to prove that any injury resulted to the defendants by reason of the lapse of time which occurred before the commencement of the proceeding and the finding is amply justified. Alexander v. State Capital Co., 9 Cal.2d 304, 313, 70 P.2d 619; Ballagh v. Williams, 50 Cal.App.2d 10, 13, 122 P.2d 343.

The judgment is affirmed.

SHENK, SPENCE, and SCHAUER, JJ., concurred.

TRAYNOR, Justice.

I concur in the judgment on the ground that the decisions of the United States Supreme Court cited in the main opinion are controlling until such time as they are reexamined and modified by that court.

Rehearing denied, CARTER, J., dissenting.

29 Cal.2d 189

PEOPLE v. JERMAN.

Cr. 4710.

Supreme Court of California, in Bank.

Nov. 1, 1946.

1. Gaming ⚿62

The statute providing that one who, whether for gain or gratuitously, places, records, or registers any bets or wagers on any contnest is guilty of a felony was intended to make the recording or registering of a bet a crime, whether or not the recorder was a bookmaker or connected with the bookmaker or whether or not he had a financial interest in the bet. Pen.Code, § 337a, subd. 4.

2. Gaming ⚿72½, 73

The holding or forwarding of money bet or to be bet, and bookmaking, are separate and distinct felonies, under the statute. Pen.Code, § 337a, subds. 3, 6.

3. Gaming ⚿63(3)

The Legislature, by adoption of the Horse Racing Act, not only did not intend to repeal the general law prohibiting general betting and registering of bets on horse races, but intended that the law remain in force subject to one exception, namely, that mutual betting be permitted if conducted in the manner and under the conditions specified in the act. Business and Professions Code, §§ 19400 et seq. 19590, 19593.

4. Gaming ⚿71

The recording or registration of a wager not made by the pari-mutuel system at the track signifies that illegal betting on horse racing is taking place. Business and Professions Code, §§ 19400, et seq., 19590, 19593; Pen.Code, § 337a, subds. 2–4, 6.

5. Gaming ⚿98(5)

Evidence sustained convictions for keeping or occupying a room with paraphernalia for purpose of recording or registering a bet on a horse race and of recording and registering such bet. Pen. Code, § 337a, subds. 2, 4.

6. Criminal law ⚿1169(2, 3), 1173(1)

The admission of incompetent evidence merely cumulative of a defendant's testimony, or of immaterial evidence, does not amount to prejudicial error, and a defendant is not entitled to a reversal of a conviction because of the court's failure to instruct on such evidence.

7. Criminal law ⚿784(1)

A court is not required to instruct on the rules of law applicable to circumstantial evidence which is incidental to and corroborative of direct evidence.

8. Criminal law ⚿814(17)

Requested instruction that circumstances must not only be entirely consistent with the theory of guilt, but must be inconsistent with any other rational conclusion, was properly refused, where the case did not admit of two theories, and defendant, by his own testimony, admitted his commission of crimes charged.

9. Criminal law ⚿829(1)

Refusal of defendant's requested charge was proper where requested charge was a duplication of instructions given by the court.

10. Gaming ⚿102

In prosecutions for keeping or occupying a room with paraphernalia for purpose of recording or registering a bet on a horse race and of recording and registering such bet, defendant's requested instruction that if jury found that he had recorded or registered bets in which he had no financial interest and to which he was not a party he should be acquitted was properly refused, since presence or absence of financial interest was immaterial. Pen.Code, § 337a, subds. 2–4, 6.

CARTER and SCHAUER, JJ., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Thomas M. Jerman was convicted of unlawfully occupying a room for the purpose of bookmaking, and of unlawfully recording and registering bets on horse races, and, from the judgments of conviction and from the order denying his motion for a new trial, he appeals.

Judgments and order affirmed.

Prior opinion 164 P.2d 829.

A. H. McConnell, of Long Beach, for appellant.

Robert W. Kenny, Atty. Gen., Everett W. Mattoon and Frank Richards, Deputy Attys. Gen., and Fred N. Howser, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

EDMONDS, Justice.

Thomas M. Jerman was convicted by a jury of the crimes of keeping or occupying a room with paraphernalia for the purpose of recording or registering a bet on a horse race (Pen.Code, § 337a, subd. 2), and of recording and registering such bet (Pen. Code, § 337a, subd. 4). The questions presented upon this appeal from the judgments and from the order denying a new trial concern the admissibility of certain telephone conversations and the refusal of the trial court to give three requested instructions.

About 2 o'clock in the afternoon, William F. Stovall and James Thiele, police officers of the city of Long Beach, entered the dwelling house occupied by Jerman, his mother and two sisters. The officers found Jerman, a cripple confined to his bed, dialing a French type telephone, which was an extension of a hall telephone. There were pens, pencils, and stationery in a desk or filing cabinet attached to an iron pipe which could be swung over his bed. At the left of the bed there was a radio which, when they entered the room, was tuned to a broadcast of race track results. Stovall took the telephone from Jerman but the line was dead. It was then discovered that the receiver of the hall telephone had been taken off the hook.

Within 10 minutes after the officers arrived, there was a call on Jerman's telephone and 10 or more followed at frequent intervals. These calls were answered by Officer Stovall. Concerning the first one of them, Stovall testified; "* * * A male voice on the phone asked, 'Tommy?' And I said 'Yes.' He said, 'Give me Bay Meadows, 22, one to place; 32, one to place; 64, one to place; did you get it?' I said 'Yes.' And he hung up." The next caller, Stovall told the jury, asked for "Tommy." As the officer related the conversation, the male voice then said, "This is Perry. * * * Give me Blitzkreig in the sixth, one to win; Freedom Ring, one to win and Gallant Devil, one to win. * * * Did you get it?" Immediately after this conversation, the officer went on, Jerman said: "Stovall, will you put it on one of my own blanks, so I can read it. I am liable to be stuck with it, if you don't." The third call, Stovall said, came from a Mrs. Warren who asked: "Give me Rock Wood Boy, 10 to win, five to place and five to show."

In the room where Jerman was lying, the officers found a Metropolitan Scratch Sheet and a daily racing form. Some of the leaves in the racing form were still uncut. Under some clothing in a closet, Jerman's sister, at his direction, produced a black book, which Officer Stovall stated was a betting record. Also found in the room were some torn sheets of paper which Stovall declared were betting markers of a previous date, and a number of papers bearing the names of race horses and the notation, "No bets accepted." Questioned as to the money which Jerman had at the time of these conversations, Officer Thiele stated that in one of the compartments of the stand or bed-desk that revolved over the bed, there was something like a wallet, which contained $490 in denominations of fifties, twenties, tens, fives and ones. In a folder on the stand there was other money, which the witness did not count.

Stovall testified that the significance of the language of the first call, "Bay Meadows, 22, one to place," in the ordinary course of bookmaking activities in the area, was that the caller wanted to have a dollar placed on the second horse in the second race at Bay Meadows Park to come in second in the race. In answer to the question, "In your opinion, as an expert, what would you regard that in the language used among bookmakers operating in this area?" he replied, "It signified to me that the person 'Tommy' to whom this conversation was directed was receiving bets over the telephone on horse racing." He further testified that he formed the same opinion as to the other telephone calls.

In his own defense, Jerman told the jury: "I am a system analyst and also operate a handicapping system service. * * * I have developed a racing system and sell it to the general public" for $200. The buyer agreed to pay 10 per cent of his winnings, said Jerman, for a period of 90 days. If at the end of the 90-day period the 10 per cent did not amount to $200, the client paid any balance due. Under this system, he had no financial interest in any bets made by his "clients." He explained that he used a racing form and under the plan his customers "call in their selections every day and I check them, that is, make any corrections and errors that they might make and also see if they have mastered the system or handicap method, whatever one I have sold them"; that he then marked down such selections on betting sheets; and that "when I first teach them this system, I require them to call their selections to me on a probationary period—about 10 to 12 days—until I am sure that they have it mastered."

Jerman admitted that, by means of a loud speaker which the officers attached to the telephone, he heard a number of the conversations. The names of five or six of the callers he recognized as those of his clients.

Concerning the betting sheets and other papers found in his room, Jerman explained that they were records of bets made by purchasers of his system. However, these were not records of bets made with him, or with any person known to him, and he had no financial interest in any bet so made by his clients or recorded by him on the betting sheets. The black book found in the closet, Jerman said, "was a record of my system and handicap players"; that the entries therein contained "were phoned to me by a party who bought my handicapping method. * * * I wrote them down here just the same as they gave them to me over the telephone"; and that by reference to his Metropolitan Scratch Sheet he could tell how many of the selections had won. When asked, "And when the player calls, you record and register that bet upon your record sheets; is that right?" Jerman replied, "That is right." And in answer to several questions, Jerman each time stated that the bets he recorded had been made with bookmakers."

Three instructions requested by Jerman were refused by the court. To convict Jerman upon circumstantial evidence, the first of these stated, "it is necessary not only that all the circumstances concur to show that the defendant committed the crime charged, but it must also be shown that these circumstances taken as a whole are inconsistent with any other rational conclusion * * *." The second instruction declared that if the jurors believed that the books and records found in Jerman's room were the same as those customarily used by bookmakers for the purpose of registering and recording bets, they must acquit him unless they also found, beyond a reasonable doubt, that the room referred to in the evidence was occupied by him for the purpose of recording and registering bets or wagers upon the results of horse races. The last of the three instructions directed an acquittal if the jurors found that the purpose of Jerman in making the memorandum of bets and wagers was to check the operations of a betting or handicapping system sold by him, and that he was not a party to those bets and had no financial interest in them.

The appellant's first contention is that the conversations over the telephone in his room at the time of his arrest constituted hearsay evidence, which was improperly admitted over objection. As to the three instructions requested by him, he takes the position that because the evidence is entirely circumstantial, he was entitled to have the jury directed in regard to the rule concerning the weight which it might give such evidence. He also stands upon his asserted right to two of the instructions as stating in explicit terms the theory of his defense.

In support of the judgment of conviction, the attorney general argues that, under the decisions of this state, the so-called hearsay evidence was properly admitted. This testimony related to contemporaneous facts which form part of the res gestae. Moreover, there was ample evidence to sustain the conviction upon each count independent of the telephone conversations, for section

337a of the Penal Code makes it a crime for any person, whether for gain, hire, reward, or gratuitously, or otherwise, to record or register any bet. Jerman's own testimony, says the attorney general, proves conclusivly that he recorded and registered bets in violation of the statute.

As to the refused instruction concerning circumstantial evidence, the People assert that the evidence against Jerman was both direct and circumstantial. The direct evidence included the testimony of the officers in regard to the various articles and equipment found in Jerman's room. Also, says respondent, the telephone conversations and the recordation of bets constituted direct evidence. And where the prosecution relies for conviction upon direct evidence, offering circumstantial evidence which is merely incidental to and corroborative of the direct evidence, the jury need not be charged that, to warrant a conviction, the circumstantial evidence must be inconsistent with any other rational conclusion. At least, if the evidence against a defendant is not "wholly circumstantial," no miscarriage of justice results from a failure to give such an instruction. But considering the guilt of Jerman as being proved either entirely or partially by circumstantial evidence, the attorney general insists that the instructions given by the court concerning the evidence were entirely sufficient to satisfy the law's requirement. As to the other two instructions requested by Jerman and refused, it is argued that the rules of law stated in them were fully covered by other charges to the jury, and no prejudicial error resulted from the failure to give them.

Section 337a, subdivision 2, of the Penal Code reads as follows: "Every person, * * * 2. Who, whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, * * * building, * * * place, stand or inclosure, of any kind, or any part thereof with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, or any purported bet or bets, or wager or wagers, or any purported wager or wagers, * * * upon the result or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever" is guilty of a felony.

Subdivision 4 of the same section provides: "Every person, * * * 4. Who, whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever," is guilty of a felony.

[1] By subdivisions 2 and 4 of this statute, the Legislature has defined as a crime either the occupying of a room with paraphernalia for the purpose of recording or registering a bet upon a horse race, or of recording or registering such a bet. From the clear and definite wording of subdivision 4, it is apparent that the Legislature intended to make the recording or registering of a bet a crime. There is no qualification stated in regard to such an act. It is quite immaterial whether or not the recorder is the bookmaker or connected with the bookmaker with whom the bet is placed. Financial interest in the bet is not an element of the crime, and the provisions specifically include one who acts gratuitously.

[2, 3] This conclusion is compelled, not only by the wording of the quoted subdivision, but by other comprehensive provisions of the section, which was enacted in 1909. The holding or forwarding of money bet, or to be bet, is made an offense by subdivision 3 of the section and, by subdivision 6, bookmaking is denounced as a crime. Each of these acts is made a separate and distinct felony (see People v. Plath, 166 Cal. 227, 135 P. 954), and the legislation authorizing horse racing with the pari-mutuel system of betting, enacted in 1933, made no change in the law pro-

scribing commercial gambling. In re Goddard, 24 Cal.App.2d 132, 74 P.2d 818. By the adoption of the Horse Racing Act (now Business & Professions Code, div. 8, ch. 4), "the Legislature not only did not intend to repeal the general law prohibiting general betting and registering of bets on horse races, but intended that the law remain in force subject to one exception, namely, that pari-mutuel betting be permitted if conducted in the manner and under the conditions specified in the act." People v. Torrey, 16 Cal.App.2d 470, 472, 60 P.2d 900, 902. An important condition of such betting is that it shall take place only at the track (Business & Professions Code, § 19590), and no other method of betting or wagering is permitted. (Business & Professions Code § 19593.)

[4] The recordation or registration of a wager not made by the pari-mutuel system at the track signifies that illegal betting is taking place, and the activities connected therewith afford law enforcement officers the most effective means of reaching and combating the evil denounced by the Legislature. If the conduct described by Jerman were a legitimate business, a bookmaker could successfully avoid detection, for there might be no record of a bet other than on the sheets of the person who noted it for the ostensible purpose of furnishing a check upon the efficacy of a betting system. Clearly such conduct and acts are within the purview of section 337a of the Penal Code and constitute an attempt to circumvent, by subterfuge, the established policy of the state against commercial gambling.

[5, 6] The direct testimony of Jerman shows that he occupied a room with paraphernalia for the purpose of registering and recording illegal bets upon horse races, and also that he registered and recorded at least one such bet. The judgment of conviction is, therefore, amply supported by his testimony, and it is not necessary to consider the question of law presented by him concerning the admissibility of the telephone conversations. If these conversations were properly received in evidence, they tended to prove either the acts which Jerman admitted or conduct constituting a crime or crimes of which he was neither charged nor convicted. The admission of incompetent evidence which is merely cumulative of a defendant's testimony, or of immaterial evidence, does not amount to prejudicial error (People v. Ives, 17 Cal.2d 459, 465, 110 P.2d 408; People v. Kalpakoff, 40 Cal.App.2d 670, 672, 105 P.2d 595; People v. McNeil, 27 Cal.App.2d 353, 357, 81 P.2d 243), and a defendant is not entitled to a reversal of a judgment of conviction by the court's failure to instruct upon such evidence.

[7] Moreover, a court is not required to instruct upon the rules of law applicable to circumstantial evidence which is incidental to and corroborative of direct evidence. People v. Lapara, 181 Cal. 66, 70, 183 P. 545; People v. Lonnen, 139 Cal. 634, 637, 73 P. 586; People v. Burns, 121 Cal. 529, 532, 53 P. 1096; People v. Corlett, 67 Cal.App.2d 33, 48, 153 P.2d 595, 964. The reason for this rule is found in the danger of misleading and confusing the jury where the inculpatory evidence consists wholly or largely of direct evidence of the crime. People v. Lapara, supra, 181 Cal. at page 70, 183 P. at page 547.

[8] And an instruction that the circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion is properly refused where, as here, the case does not admit of two theories, the defendant by his own testimony having admitted his commission of the crime. People v. Raber, 168 Cal. 316, 143 P. 317.

[9, 10] No error, therefore, was committed by the trial court in refusing to give Jerman's requested instruction concerning circumstantial evidence. The ruling upon the second charge submitted by him was also correct. The statement of the terms of subdivision 2 of section 337a of the Penal Code, and of the doctrine of reasonable doubt, was a duplication of instructions given by the court. The one submitted by Jerman directing the jury to acquit him if it found that he had recorded or registered bets in which he had no financial interest and to which he was not a party directly

contradicts the provisions of the statute which the district attorney accused him of violating and was properly refused.

The judgments and the order denying a new trial are, and each of them is, affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, and SPENCE, JJ., concurred.

CARTER, Justice (dissenting).

I dissent.

The general rule stated by the majority opinion is far too broad and is outside the scope of the statute. It is said: "From the clear and definite wording of subdivision 4, it is apparent that the legislature intended to make the recording or registering of a bet a crime. There is no qualification stated in regard to such an act. It is quite immaterial whether or not the recorder is the bookmaker, or connected with the bookmaker with whom the bet is placed. Financial interest in the bet is not an element of the crime, and the provisions specifically include one who acts gratuitously." Under that rule a person who placed a bet with a bookmaker and made a notation for his own convenience would be guilty of a felony. Likewise, his stenographer or bookkeeper who kept his records, would be guilty. Many other illustrations could be imagined. Badly stated the rule makes unlawful any writing down of a bet, other than a bet made at the race track, at any time, any place, by any person. While the literal wording of subdivision 4 of section 337a of the Penal Code might justify such a rule, that subdivision must be read in the light of all the other subdivisions of the section and the evil at which the statute is aimed, namely, bookmaking. That such is the purpose of the section is evident from the first subdivision which declares unlawful "book-making." In order to facilitate the enforcement of that provision, subdivision 2 condemns the keeping or occupancy of any place having bookmaking paraphernalia therein. The essence of the matter still is, that it must have *some connection with bookmaking*. The paraphernalia must, as expressed in that subdivision, be kept for "recording or registering" bets, that is, bookmaking. To embrace more individuals and further aid in the enforcement of said section, subdivision 3 denounces persons who receive, hold or forward anything staked on a bet. Still it is dealing with the subject of bookmaking. Subdivision 5 extends to persons permitting other persons using their premises for the denounced purposes. Subdivision 6 proscribes the laying, offering or acceptance of bets. Hence it must be clear that before there may be a violation of subdivision 4, that is, the recording or registering of bets, there must be some connection between those acts and bookmaking. The registration or recording must be done for the purpose of noting a bet that is to be or has been made by the acceptor, recipient or taker of the bet or the one who is to place it with an acceptor. The one taking the bets is the bookmaker.

It is firmly established that the words "registering" and "recording" refer to and are connected with bookmaking—the taking of bets. It is said in Corpus Juris Secundum: "Bookmaking. A species of betting on races; the business of receiving and accepting bets or wagers on the result of races, usually after quoting odds to prospective betters and having them write out slips. The term imports some method of recording bets; and, while analogous to 'pool selling,' strictly speaking, it is distinguished therefrom." 38 C.J.S., Gaming, § 1, p. 54. It is stated in Spies v. Rosenstock, 87 Md. 14, 39 A. 268, 269: "that the business of bookmaking is betting on horse races, and is called bookmaking because the bets are booked, or a record kept of them in a book." See, also, People v. Langan, 196 N.Y. 260, 89 N.E. 921, 25 L.R.A.N.S. 479, 17 Ann.Cas. 1081.

It follows in the instant case that the trial court erred in refusing to give the instructions offered by defendant which would have submitted to the jury the issue of whether he was recording bets in the process of bookmaking. If his testimony is to be believed, he wrote the bets down—kept a record of them, but as he was not the acceptor, recipient or taker of bets, nor acting for anyone who was, and since he did not purport to place such bets with anyone, he was not, therefore, a bookmaker within any of the accepted definitions of that term. The ones to whom he sold his "system" placed their own bets with bookmakers and reported them to him. He merely compiled them into a record from which he evolved a "system" designed to enable them to increase their winnings. In my opinion the making of such a record does not constitute a violation of the statute denouncing bookmaking as a crime. For the foregoing reasons the judgment should be reversed.

SCHAUER, J., concurred.

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29 Cal.2d 200

Ex parte WELLS.

Cr. 4752.

Supreme Court of California, in Bank.

Nov. 1, 1946.

1. **Contempt** 🔑63(4)

An adjudication of direct contempt of court in refusing to answer questions concerning whereabouts of funds withdrawn from bank by contemnor in violation of restraining order was fatally defective, in absence of recital of exact questions asked. Code Civ.Proc. § 1211.

2. **Contempt** 🔑63(4)

Generally, statutory requirement that order adjudging person guilty of direct contempt of court recite facts constituting contempt is jurisdictional, and order assuming to punish direct contempt summarily is void, unless it shows on its face acts sufficient to constitute legal contempt. Code Civ.Proc. § 1211.

3. **Contempt** 🔑63(4)

An order adjudging person guilty of direct contempt of court must contain statement of facts equivalent to those required by law to be incorporated in affidavit for constructive contempt, and such facts must prove contempt, mere conclusions being insufficient. Code Civ.Proc. § 1211.

4. **Contempt** 🔑63(1)

The rule that mere presumptions and intendments are to be indulged in support of ordinary judgments does not apply to order adjudging person guilty of direct contempt of court.

5. **Contempt** 🔑63(1)

A judgment, ordering that person adjudged in contempt of court for refusal to answer questions concerning whereabouts of funds withdrawn from bank by him in violation of restraining order be confined in county jail until he purged himself of such contempt, without specifying acts by which he was to do so, reciting questions which he must answer, stating that he must restore funds to bank account, or finding that such acts were within his power to perform, was void. Code Civ.Proc. § 1219.

◆

Habeas corpus proceeding by Cassius M. Wells for release from custody in the Fresno County Jail under a judgment of conviction for contempt of court.

Writ sustained, and petitioner discharged.

N. Lindsay South and James C. Janjigian, both of Fresno, for petitioner.

James M. Thuesen, Dist. Atty., and Robert M. Wash, Deputy Dist. Atty., both of Fresno, for respondent.

SCHAUER, Justice.

Petitioner Cassius M. Wells stands committed to the Fresno County Jail upon one judgment for two asserted contempts of court: a constructive contempt, violation of a restraining order; and a direct contempt, refusal to answer questions at the hearing on the charge of constructive contempt. He seeks release upon a writ of habeas corpus. We have concluded that, regardless of the merits of the controversy otherwise, the judgment under which he is imprisoned is void and, hence, that he is entitled to release.

As shown by the return of the sheriff to the writ, the basis of petitioner's confinement is the following judgment and commitment:

"Cassius M. Wells, the defendant in the above entitled action, having appeared in

Department 4 of the above-entitled Court on the 22nd day of August, 1946, then and there to show cause, if any he had, why he should not be punished for contempt for violation of the restraining order heretofore issued by this Court and said defendant, Cassius M. Wells, having been found guilty of contempt for removing the money from the bank, in violation of the restraining order and for refusing to answer questions concerning the whereabouts of certain funds withdrawn from the bank in violation of the restraining order heretofore issued by this Court, and said matter being continued till August 26, 1946, for passing sentence.

"Now Therefore, It Is Ordered that said Cassius M. Wells be, and he is hereby adjudged to be in contempt of this Court, and that he be confined in the Fresno County Jail until he purges himself of said contempt. It is further ordered that said defendant be and he is hereby remanded to the Sheriff of Fresno County until he obeys said order of this Court."

[1-4] The adjudication that petitioner is in contempt "for refusing to answer questions" (the direct contempt) is fatally defective because the exact questions are not recited. Section 1211 of the Code of Civil Procedure requires that, in adjudging a person guilty of a contempt "committed in the immediate view and presence of the court, * * * an order must be made, reciting the facts as occurring in such immediate view and presence, * * *." It is the general rule in this state that "This requirement [that the order recite the facts constituting the contempt] is jurisdictional, and an order which assumes to punish summarily a direct contempt of court is void unless it shows on its face acts sufficient to constitute a legal contempt. The order must contain a statement of facts equivalent to those which the law says must be incorporated in an affidavit for constructive contempt and such facts must prove the contempt. Mere conclusions are not sufficient. In such cases the rule that mere presumptions and intendments are to be indulged in support of ordinary judgments does not apply." (5 Cal.Jur. 950-951, quoted with approval in In re Battelle (1929), 207 Cal. 227, 255, 277 P. 725, 65 A.L.R. 1497.) Among the particular applications of this rule are cases which hold that "a witness before a court or other inquisitorial body who is otherwise orderly and respectful cannot be adjudged guilty of contempt committed in the presence of such tribunal for his failure or refusal to answer any question * * * in the absence from the order so adjudging him to be guilty of contempt of an express recital of facts affirmatively showing not only the precise questions which he has declined to answer * * * but also affirmatively setting forth the facts which show the materiality and pertinency of * * * [the] evidence to the issue before the court or other tribunal." In re Battelle (1929), supra, pp. 255-256 of 207 Cal., 277 P. 725, 65 A.L.R. 1497, and cases there cited; In re Zuker (1936), 13 Cal.App.2d 427, 431, 56 P.2d 1261.

[5] Upon another ground the judgment of contempt here is void in its entirety. It purports to confine the petitioner "until he purges himself of said contempt," but it does not comply with section 1219 of the Code of Civil Procedure, which section governs commitments of that nature. That section provides, "When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he have performed it, and in that case the act must be specified in the warrant of commitment." Here the judgment (which constitutes the "warrant of commitment") does not specify the act or acts by which petitioner is to purge himself of contempt. The questions which he must answer are not recited. He is "remanded to the Sheriff * * * until he obeys said order of this Court." It is not stated that petitioner must restore any funds to any bank account. If it was intended to prescribe such a condition the commitment would have to so specify. Furthermore, the judgment must not only specify the act to be performed; it must also include a finding that such act is within the power of the contemner to perform. Otherwise it is void. (5 Cal.Jur. 952 and cases there cited; Ex parte Silvia (1899), 123 Cal. 293, 294, 55 P. 988, 69

Am.St.Rep. 58; Myers v. Superior Court (1920), 46 Cal.App. 206, 209, 189 P. 109.)

Since the judgment of contempt is void for failure to conform to the above stated requirements, other contentions of petitioner need not be discussed.

The writ is sustained and petitioner is discharged.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

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29 Cal.2d 203

PASO ROBLES WAR MEMORIAL HOSPITAL DIST. v. NEGLEY.

L. A. 19776.

Supreme Court of California, in Bank.

Nov. 4, 1946.

1. Mandamus 🔑102(1), 103

Mandamus will lie to compel performance of a ministerial duty such as the signing or attesting of a bond or warrant or the issuance of a warrant.

2. Hospitals 🔑2

Legislature may authorize a public corporation to build and operate a hospital as a business.

3. Statutes 🔑93(3)

The Local Hospital District Law is not invalid as special legislation because its application is limited to counties of 200,000 or less population, since the lack of hospitals in less populated areas is a threat to health and safety and justifies a classification on the basis of population. Health and Safety Code, §§ 32000–32313.

4. Hospitals 🔑2

The Local Hospital District Law, in imposing an ad valorem levy on all real and personal property within district, not upon basis of special benefit, imposes a "general tax" and not a "special assessment". Health and Safety Code, §§ 32200–32205.

See Words and Phrases, Permanent Edition, for all other definitions of "General Tax" and "Special Assessment".

5. Hospitals 🔑2

The inclusion of federally owned lands within local hospital district does not invalidate district. Health and Safety Code, §§ 32000–32313.

6. Taxation 🔑5

While federal land itself is not taxable, possessory rights therein and improvements thereon made by an individual for his own use and benefit are subject to taxation.

7. Hospitals 🔑1

A public body may acquire property for the purpose of leasing it to private persons, and hence local hospital district may lease hospitals to private persons for operation. Health and Safety Code, §§ 32000–32313.

8. Hospitals 🔑2

The 20-cent tax limit in Local Hospital District Law is confined to maintenance expenses and a fund for capital outlay, and a levy in addition to such limit may be made for acquisition, construction, maintenance, or alteration, or to retire bond issues. Health and Safety Code, §§ 32202, 32203, 32221, 32240, 32300–32313.

9. Hospitals 🔑2

Provisions in Local Hospital District Law for a local hospital district in two or more counties are valid. Health and Safety Code, §§ 32000–32313.

10. Hospitals 🔑2

A local hospital district may properly include an entire county, and its identity as a special district is not merged in that of the county merely because boundaries are the same. Health and Safety Code, §§ 32000–32313.

11. Hospitals 🔑2

The fact that Local Hospital District Law authorizes a difference in rates to be charged nonresidents does not make act invalid. Health and Safety Code, §§ 32000–32313.

EDMONDS, J., dissenting.

◆

Original proceeding in mandamus on the petition of the Paso Robles War Memorial Hospital District against Howard E. Negley, as secretary of such hospital district, to compel secretary to attest certain bonds of the district.

Peremptory writ issued.

O'Melveny & Myers, James L. Beebe, William W. Alsup and Roy B. Woolsey, all of Los Angeles, for petitioner.

Clyde C. Woodworth, of Inglewood, for respondent.

TRAYNOR, Justice.

By this proceeding in mandamus petitioner seeks to compel the respondent, Secretary of the Paso Robles War Memorial Hospital District, to attest bonds of the district in the amount of $200,000. The issuance of the bonds was authorized by resolution of the board of directors of the district following a special bond election whereby more than two-thirds of the voters of the district voting in the election cast their votes in favor of the issuance of the bonds to construct a hospital and acquire a site and all furniture, apparatus, equipment and other necessary property. The district was formed, the election was held, and the bonds were authorized pursuant to The Local Hospital District Law. Stats. 1945, ch. 932, Health & Safety Code, §§ 32000 to 32313. Respondent refuses to attest the bonds upon the ground that The Local Hospital District Law is unconstitutional.

[1] It is settled that mandamus will lie to compel the performance of a ministerial duty such as the signing or attesting of a bond or warrant or the issuance of a warrant. Golden Gate Bridge, etc., Dist. v. Felt, 214 Cal. 308, 316, 5 P.2d 585; Mercury Herald Co. v. Moore, 22 Cal.2d 269, 138 P.2d 673, 147 A.L.R. 1111; City of Whittier v. Dixon, 24 Cal.2d 664, 666, 151 P.2d 5, 153 A.L.R. 956.

The alleged grounds of unconstitutionality are: (1) That the state has no power to authorize a public corporation to build and operate a hospital as a business; (2) that the provision in The Local Hospital District Law limiting its use to counties of 200,000 population or less invalidates it as special legislation; (3) that it cannot be determined from the act whether the levy provided therein is a tax or special assessment; (4) that approximately 35,000 acres of land owned by the United States are included within the district and that this invalidates the organization of the district; (5) that the district does not intend to operate the hospital but intends to lease it to other persons for operation, and that a public body has no power to acquire property for the purpose of leasing it to private individuals; (6) that the principal and interest of the bonds must be paid from the moneys raised under the 20 cent tax limit and no additional levy may be made for that purpose; (7) that the district lies in two counties and the provisions of law for such district in two counties are both unworkable and unconstitutional; (8) that a local hospital district cannot include an entire county; (9) that it is invalid in authorizing a difference in rates to be charged nonresidents. We find no substance in any of these alleged grounds of unconstitutionality.

[2] (1) No provision of the Constitution of the State of California or of the Constitution of the United States prohibits the Legislature from authorizing a public corporation to build and operate a hospital as a business. Green v. Frazier, 253 U.S. 233, 40 S.Ct. 499, 64 L.Ed. 878; Jones v. City of Portland, 245 U.S. 217, 38 S.Ct. 112, 62 L.Ed. 252, L.R.A.1918C, 765, Ann. Cas.1918E, 660; Standard Oil Co. v. City of Lincoln, 275 U.S. 504, 48 S.Ct. 155, 72 L.Ed. 395; Puget Sound Power & Light Co. v. City of Seattle, 291 U.S. 619, 54 S.Ct. 542, 78 L.Ed. 1025; see Housing Authority of the County of Los Angeles, v. Dockweiler, 14 Cal.2d 437, 450, 451, 94 P.2d 794; Chafor v. City of Long Beach, 174 Cal. 478, 489, 490, 163 P. 670, L.R.A. 1917E, 685, Ann.Cas.1918D, 106; Kellar v. City of Los Angeles, 179 Cal. 605, 178

P. 505; City of Oakland v. Williams, 206 Cal. 315, 274 P. 328. "In the light of modern knowledge as to the intimate relation of the public health to the public welfare, whether regarded from a social, economic, or moral standpoint, a hospital subserves a public use." (51 Am.Jur. 400). There can be little question that a tax for a hospital owned by a public corporation is a tax for a public purpose. Joint Highway District No. 13 v. Hinman, 220 Cal. 578, 586, 32 P.2d 144; Stuckenbruck v. Board of Supervisors, 193 Cal. 506, 225 P. 857; Anaheim Sugar Co. v. County of Orange, 181 Cal. 212, 217, 183 P. 809; Bliss v. Hamilton, 171 Cal. 123, 133, 152 P. 303; Palos Verdes Library District of Los Angeles County v. McClellan, 97 Cal.App. 769, 776, 777, 276 P. 600; see McAllister, Public Purpose in Taxation, 18 Cal.L.Rev. 137.

[3] (2) The Local Hospital District Law is not invalid as special legislation because its application is limited to counties of 200,000 or less population. Counties of large population, with large cities, have many hospitals owned and operated by churches or privately endowed. but the rural counties and counties with small cities are almost entirely without such hospitals. This lack of hospitals is a threat to health and safety. To meet such a problem a classification may be made on the basis of population. People ex rel. State Board of Harbor Com'rs for Bay of San Diego v. Mullender, 132 Cal. 217, 222, 64 P. 299; Martin v. Superior Court, 194 Cal. 93, 100, 227 P. 762; see, also, Ogle v. Eckel, 49 Cal.App.2d 599, 604, 605, 122 P.2d 67.

[4] (3) The levy imposed by the Local Hospital District Law is an ad valorem levy on all real and personal property within the district. Health & Safety Code, §§ 32200 to 32205. A levy imposed on all of the property in a district, both real and personal, according to its value and not upon the basis of special benefit, is a general tax and not a special assessment. Anaheim Sugar Co. v. County of Orange, 181 Cal. 212, 216, 217, 183 P. 809; American Co. v. City of Lakeport, 220 Cal. 548, 32 P.2d 622; People v. Whyler, 41 Cal. 351, 354; Williams v. Corcoran, 46 Cal. 553, 555, 556; Joint Highway District No. 13 v. Hinman, 220 Cal. 578, 586, 587, 32 P.2d 144.

[5, 6] (4) The inclusion of federally owned lands within the district does not invalidate the district. While federal land itself is not taxable, possessory rights therein and improvements thereon made by an individual for his own use and benefit are subject to taxation. People v. Shearer, 30 Cal. 645; City of Pasadena v. County of Los Angeles, 182 Cal. 171, 176, 187 P. 418; Outer Harbor, etc., Co. v Los Angeles County, 47 Cal.App. 194, 196, 193 P. 142. Nontaxable lands may properly be included within an assessment district without affecting the validity of the district. Southlands Co. v. City of San Diego, 211 Cal. 646, 667, 297 P. 521; Cullen v. Glendora Water Co., 113 Cal. 503, 39 P. 769, 45 P. 822, 1047; see 5 McQuillin, Municipal Corporations (2d ed.) 840.

[7] (5) A public body may acquire property for the purpose of leasing it to private persons. City of Oakland v. Williams, 206 Cal. 315, 274 P. 328; Byington v. Sacramento Valley, etc., Co., 170 Cal. 124, 148 P. 791; City and County of San Francisco v. Linares, 16 Cal.2d 441, 106 P.2d 369; Lynch v. City and County of San Francisco, 3 Cal.2d 141, 43 P.2d 538; see, also, Egan v. City and County of San Francisco, 165 Cal. 576, 133 P. 294, Ann.Cas.1915A, 754.

[8] (6) A levy in addition to the 20 cent tax limit may be made to pay the principal and interest of the bonds. The Local Hospital District Law provides three methods of financing: (a) annual assessments, limited to 20 cents on the $100, for maintenance and a fund to finance capital outlays (Health & Safety Code, §§ 32202, 32203, 32221); (b) special assessments for acquisition, construction, maintenance or alteration, which may be in addition to the 20 cent limitation prescribed by section 32203 (Health & Safety Code, §§ 32240, 32243); (c) bond issues for acquisition, construction, maintenance or alteration. Health & Safety Code, § 32300 et seq. The

20 cent tax limit referred to in section 32203 is confined to maintenance expenses and a fund for capital outlays. If the regular annual assessments are not adequate for construction purposes, special assessments may be levied or bonds may be issued for this purpose. If the principal and interest of such bonds cannot be paid out of the regular annual assessments then an additional levy must be made to pay such principal and interest. The board of directors is required to levy annually a sum sufficient to pay the principal and interest of such bonds. (Health & Safety Code, § 32313.) Legislative authority to incur a debt carries with it the power to tax to meet that indebtedness unless the law clearly states a contrary intention. Ralls County Court v. United States, 105 U.S. 733, 26 L.Ed. 1220; United States v. Fort Scott, 99 U.S. 152, 25 L.Ed 348.

[9] (7) The provisions for a local hospital district in two counties are neither unworkable nor unconstitutional. The validity of joint special assessments or taxation districts has been frequently sustained. Las Animas & San Joaquin Land Co. v. Preciado, 167 Cal. 580, 140 P. 239; Turlock Irrigation District v. Williams, 76 Cal. 360, 18 P. 379; In re Sutter-Butte By-Pass Assessment No. 6 of Sacramento & San Joaquin Drainage Dist., 191 Cal. 650, 218 P. 27; Joint Highway District No. 13 of California v. Hinman, 220 Cal. 578, 32 P.2d 144; see, also, Watson v. Greely, 67 Cal.App 328, 339, 227 P. 664; Hagar v. Reclamation District No. 108, 111 U.S. 701, 704, 705, 4 S.Ct. 663, 28 L.Ed. 569.

[10] (8) A local hospital district may include an entire county. The identity of a special district is not merged in that of another political entity simply because its boundaries are the same as that of the other political entity. Los Angeles City School District v. Longden, 148 Cal. 380, 381, 382, 385, 83 P. 246; In re Wetmore, 99 Cal. 146, 151, 33 P. 769; Hancock v. Board of Education, 140 Cal. 554, 74 P. 44; Galt County Water District v. Evans, 10 Cal.App.2d 116, 51 P.2d 202.

[11] (9) The Local Hospital District Law is not invalid because it authorizes a difference in rates to be charged nonresidents. Bryan v. Regents of the University of California, 188 Cal. 559, 205 P. 1071; Town of St. Helena v. Butterworth, 198 Cal. 230, 244 P. 357; Durant v. City of Beverly Hills, 39 Cal.App.2d 133, 139, 102 P.2d 759; A. E. Hoffman Candy Co. v. City of Newport Beach, 120 Cal.App. 525, 8 P.2d 235; see, also, Pasadena City High School District of Los Angeles County v. Upjohn, 206 Cal. 775, 276 P. 341, 63 A.L.R. 408.

Let the peremptory writ issue as prayed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, and SPENCE, JJ., concurred.

EDMONDS, Justice.

Quite aside from the questions presented for decision by the hospital district in regard to the validity of the statute creating it, I adhere to the views which I have heretofore stated in regard to a proceeding in this form. City of Whittier v. Dixon, 24 Cal.2d 664, 668, 151 P.2d 5, 153 A.L.R. 956; City and County of San Francisco v. Boyd, 22 Cal.2d 685, 707, 140 P.2d 666; City and County of San Francisco v. Linares, 16 Cal.2d 441, 448, 106 P.2d 369. By this decision, a question of great public interest is determined in a suit brought by the hospital district against its secretary, no taxpayer or other person whose rights are affected being a party to the litigation. Under such circumstances, in my opinion, the action is a collusive one which should not be entertained.

76 Cal.App.2d 706

GRANT et al. v. CALIFORNIA BENCH CO. et al.

Civ. 15554.

District Court of Appeal, Second District, Division 2, California.

Nov. 4, 1946.

1. Trade-marks and trade-names and unfair competition ⚷68(1)

Unfair competition is a question of fact, and no inflexible rule can be stated as to what conduct will constitute unfair competition.

2. Trade-marks and trade-names and unfair competition ⚷68(1)

The test of what conduct will constitute unfair competition is whether the public is likely to be deceived.

3. Trade-marks and trade-names and unfair competition ⚷68(1)

Even though each feature composing an article may be open to public use, if the ensemble created by defendant produces an object which misleads the public to plaintiff's detriment and to the defendant's advantage, plaintiff has a cause of action for unfair competition.

4. Trade-marks and trade-names and unfair competition ⚷92

Allegations of amended complaint that, to plaintiffs' detriment, defendants were copying exactly the design, size, shape, color, arrangement, and structural combination of courtesy benches which plaintiffs had previously used in connection with their business, and that such imitation was misleading to the public, stated a cause of action for unfair competition.

5. Evidence ⚷32

Courts of record do not take judicial notice of municipal ordinances.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Clyde Grant, doing business under the fictitious firm name of Sunset Advertising System, and Dewey Robertson, doing business under the fictitious firm name of Robertson Outdoor Advertising Company, against the California Bench Company, a corporation, and others, for an injunction, accounting, and damages for unfair competition. From judgment for defendants predicated upon the sustaining of demurrer to first amended complaint without leave to amend, plaintiffs appeal.

Judgment reversed with directions.

Shafer and Grimm, of Los Angeles, for appellants.

Simon and Garbus, of Beverly Hills, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants predicated upon the sustaining of their demurrer without leave to amend to plaintiffs' first amended complaint in an action for an injunction, accounting and damages for unfair competition, plaintiffs appeal.

It was alleged in the complaint as amended, that plaintiff Clyde Grant had established an advertising business; that in connection with the operation of said business he had spent money, time, work and labor in the exploitation and use of certain benches denominated "courtesy benches"; that such benches were of a distinct combination of features, design, size, shape, color, arrangement and structural combination; that plaintiff Grant had granted a license to his co-plaintiff Dewey Robertson to use in the operation of his advertising business a "courtesy bench" similar in type to that used by plaintiff Grant. It was further alleged that defendants, to plaintiffs' damage, were circularizing the public offering to provide bench advertising, and that such literature contained "a photograph and picture of a courtesy bench of the exact distinctive design, style, character of description of courtesy benches of said plaintiffs as the same herein are described and in imitation of the distinct combination of features of design, size, shape, color, arrangement and structural combination of the courtesy benches so used and being used by the plaintiffs."

A general demurrer on the ground that the complaint as amended did not state a cause of action was sustained without leave to amend.

This is the sole question presented for our determination:

Did the complaint as amended state a cause of action?

This question must be answered in the affirmative and is governed by these rules:

[1, 2] 1) Unfair competition is a question of fact and no inflexible rule can be stated as to what conduct will constitute unfair competition. The universal test is whether the public is likely to be deceived. (Pohl v. Anderson, 13 Cal.App.2d 241, 242, 56 P.2d 992.)

[3] 2) Even though each feature composing an article may be open to public use, if the ensemble created by defendant produces an object which misleads the public to plaintiff's detriment and to the defendant's advantage, plaintiff has a cause of action for unfair competition. (Weinstock, Lubin & Co. v. Marks, 109 Cal. 529, 538 et seq, 42 P. 142, 30 L.R.A. 182, 50 Am.St. Rep. 57; Nokes v. Mueller, 72 Ill.App. 431, 435; Hi-Land Dairyman's Ass'n v. Cloverleaf Dairy, 107 Utah 68, 151 P.2d 710, 716. See also Nims on Unfair Competition and Trade-Marks (1936) 3rd Edition, page 378, section 135 and Sun-Maid Raisin Growers v. Mosesian, 84 Cal.App. 485, 495, 258 P. 630.)

[4] Applying the foregoing rules to the facts in the present case, since plaintiffs alleged that to their detriment defendants were copying exactly the design, size, shape, color, arrangement and structural combination of the courtesy benches which plaintiffs had previously used, and that such imitation was misleading to the public, the complaint stated a cause of action and it was a question of fact for the determination of the trier of fact whether or not plaintiffs could substantiate the material allegations of their complaint with competent evidence. Therefore the general demurrer should have been overruled.

[5] There is no merit in defendants' contention that plaintiffs in constructing their "courtesy benches" had complied with the provisions of an ordinance of the city of Los Angeles relative to advertising on benches, and that therefore defendants' act in imitating plaintiffs' product was not unfair competition. The law is settled in California that courts of record do not take judicial notice of municipal ordinances. (See cases cited in 18 Cal.Jur., 1924, p. 922, sec. 211, note 18; 8 Cal.Jur. 10 Yr.Supp., 1936, p. 170, sec. 211.) Hence the ordinance is not before this court for consideration. Its provisions are immaterial to a consideration of the question as to whether the complaint as amended states a cause of action or not.

For the foregoing reasons the judgment is reversed with directions to the trial court to overrule the demurrer and to allow the defendants a reasonable time to answer if they be so advised.

MOORE, P. J., and WILSON, J., concur.

76 Cal.App.2d 635

Ex parte SAUNDERS.

Cr. 2444.

District Court of Appeal, First District, Division 2, California.

Oct. 29, 1946.

1. Divorce 🔑303(3)

Generally, where the custody of a child has been awarded to one parent by a divorce decree, a subsequent order modifying that decree and awarding the child's custody to the other parent can only be made after notice to the custodial parent, and an order made without notice is void.

2. Judgment 🔑815

The full faith and credit clause of the federal Constitution does not require the enforcement in another state of a judgment or order which is regarded as void under the laws of the state in which it was entered. U.S.C.A.Const. art. 4, § 1; Code Civ.Proc. § 1913

3. Divorce ⚷326

Where mother, who had been granted custody of child by Illinois divorce decree that forbade her to take child out of Illinois without court's permission, took child to California without court's permission with intention of taking the child to Australia, and father ex parte and without notice to mother in California obtained an order of Illinois court modifying the divorce decree so as to give him custody of the child, modification was void and would not be enforced in California, under the full faith and credit clause in habeas corpus proceeding by father to obtain custody of the child. U.S.C.A.Const. art. 4, § 1; Code Civ.Proc. § 1913.

◆

Proceeding in the matter of the petition of Charles William Saunders for a writ of habeas corpus to obtain the custom of Christine Saunders, an infant child of the petitioner and Irene Saunders, from the custody of Irene Saunders.

Writ of habeas corpus discharged, and child ordered returned to the custody of the mother.

William Farnum White, of San Francisco, for petitioner.

John E. Anderton and C. W. Durbrow, both of San Francisco, for respondent.

DOOLING, Justice.

By this proceeding for a writ of habeas corpus the petitioner, the father of Christine Saunders, an infant girl sixteen months of age, seeks to obtain the custody of such child from her mother, Irene Saunders. The mother and father were married in the Commonwealth of Australia on October 18, 1944, while the father was serving in our armed forces overseas. The mother is an Australian citizen and the child was born in Australia. After the father was discharged from the army the mother brought the child to this country from Australia and joined the father in Illinois in which state he was then and still is domiciled. After a very brief interval the mother brought suit for divorce against the father and on August 22, 1946 a decree of divorce was entered in the Illinois court granting her a divorce. That decree awarded the custody of the child to the plaintiff mother. It contained, however, the following provision:

> "And it is further ordered, adjudged and decreed by the Court that the plaintiff is hereby forbidden and enjoined from taking the said minor child Christine Saunders, outside of the jurisdiction of this Court, except with the express permission of this Court following notice to the defendant of the seeking of such permission by the plaintiff."

In violation of this injunctive order the mother took the child from Illinois to San Francisco with the intention of returning with the child to her home in Australia. Upon learning of her departure with the child from Illinois the father, ex parte and without the service of notice in any manner, on September 12, 1946 obtained an order from the Illinois court in which the original decree of divorce had been entered, modifying that decree and awarding the custody of the child to him.

Armed with this order modifying the decree he instituted habeas corpus proceedings in the superior court in and for the City and County of San Francisco to obtain possession of the child. In his petition he not only pleaded the proceedings in the Illinois court, but he also pleaded his own fitness to have the custody of the child and that her welfare was endangered by the alleged wrongful and neglectful conduct of the mother since the entry of the original decree of divorce. After a hearing which consumed portions of several days and in which witnesses were produced on both sides concerning the mother's conduct and treatment of the child the superior court entered its order discharging the writ of habeas corpus.

In the proceeding before this court the petitioner has elected to stand solely upon the rights conferred upon him by the order of modification of September 12, 1946 by which the child's custody was awarded to him, arguing that under the full faith and credit provision of the United States constitution this court is bound by that order. To this narrow issue we therefore direct our attention.

[1] It is the generally accepted rule in the courts of this country that where the custody of a child has been awarded to one parent by a decree of divorce a subsequent order modifying that decree and awarding the custody of the child to the other parent can only be made after notice to the custodial parent and an order made without notice is void. In re Culp, 2 Cal. App. 70, 83 P. 89; Blachly v. Blachly, 169 Iowa 489, 151 N.W. 447; Abell v. Second Judicial Dist. Court, 58 Nev. 89, 71 P.2d 111; Gordon v. Gordon, 196 Miss. 476, 17 So.2d 191; Jasper v. Tartar, 224 Ky. 834, 7 S.W.2d 236; State ex rel. Tatum v. Ramey, 134 Mo.App. 722, 115 S.W. 458; Jack v. Jack, 294 Mo. 128, 243 S.W. 314; 17 Am.Jur., Divorce and Separation, sec. 685, p. 519. Petitioner cites and relies upon Morrill v. Morrill, 83 Conn. 479, 77 A. 1. In that case the court said (77 A. at page 3):

"Reasonable notice as far as feasible, of contemplated action subsequent to the original judgment might well be required as a measure of fairness, and thus as a practical condition of further action, but that notice was not a condition upon which the jurisdiction was founded."

In a note in 76 A.L.R. at page 254 this case of Morrill v. Morrill is noted as contra the weight of authority.

However we need not look further in this case than to the law of the state of Illinois in which the modifying order upon which petitioner relies originated. In Cummer v. Cummer, 283 Ill.App. 220 the court passed upon the validity of an order changing the custody of a child which had previously been awarded by divorce decree to the father. The court after deciding that the father had not been served with notice of the proceedings for modification said 283 Ill.App. at page 234:

"It requires neither argument nor citation of authority to sustain the proposition that in a divorce proceeding where the parties have a minor child the court retains jurisdiction of the cause as to the care, custody and control of such child until it attains its majority, so that the rights of the minor child may be protected. It is fundamental, however, that before that jurisdiction can be brought into play and the court empowered to enter a valid order affecting the rights of the father, who has by final decree been awarded the care and custody of the child, reasonable notice must be given him so that he may be afforded an opportunity for his day in court to protect his rights."

Again the court said 283 Ill.App. at page 239:

"Where it is clear, as here, that defendant was not served with notice, had no knowledge of the proceedings against him, and, therefore, had no opportunity to defend against them, the judgments and orders are void and should be set aside."

[2] The full faith and credit clause does not require the enforcement in another state of a judgment or order which is regarded as void under the laws of the state in which it was entered (In re Culp, supra, 2 Cal.App. 70, 83 P. 89; Restatement, Conflict of Laws, sec. 432b; Code Civ.Proc. sec. 1913) and this is but a specific application of the general rule that a void judgment is not entitled to full faith and credit in the courts of other states. 15 Cal.Jur., Judgments, sec. 246, pp. 241, 242, sec. 248, p. 244; 34 C.J., Judgments, sec. 1614, pp. 1138, 1140; 31 Am.Jur., Judgments, sec. 549, pp. 156, 159.

Petitioner relies upon In re Wenman, 33 Cal.App. 592, 165 P. 1024, but in that case the petitioning father had been given custody of his child by a concededly valid decree which was entitled to full faith and credit in the courts of this state.

[3] We do not condone the conduct of the respondent mother in flouting the injunctive provision of the Illinois decree which she herself obtained. In the circumstances we may assume that under the Illinois law valid service might have been made on her attorney in the action (Reynolds v. Reynolds, 21 Cal.2d 580, 134 P.2d 251) or on some officer of the court if she had no attorney (Code Civ.Proc., sec. 1015) and that the court would have been justified in ordering the time of giving the notice shortened drastically. But here there is no pretence that any notice was given and under the law of Illinois as expounded

in Cummer v. Cummer, supra, we must hold the order of modification upon which petitioner bases his whole claim to be void.

We may agree with petitioner that the mother and child being only fleetingly in the jurisdiction we cannot make an order changing custody, except temporarily upon a showing that the child's welfare is endangered. Restatement, Conflict of Laws, secs. 117, 118, 147, 148. The child is now in the custody of the mother. The petitioner's claim to custody is based on a void order. There was no attempt to show that the welfare of the child is endangered and the superior court found otherwise after a trial of that issue.

The writ of habeas corpus is discharged and the child is ordered returned to the custody of her mother.

NOURSE, P. J., and GOODELL, J., concur.

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76 Cal.App.2d 631

GREENBERG et al. v. KOPPELOW et al.

Civ. 13093.

District Court of Appeal, First District,
Division 2, California.

Oct. 29, 1946.

Hearing Denied Dec. 23, 1946.

1. Landlord and tenant 🔑288

An "unlawful detainer action" does not rise upon contract, but sounds in tort. Code Civ.Proc. § 1161.

See Words and Phrases, Permanent Edition, for all other definitions of "Unlawful Detainer Action".

2. Landlord and tenant 🔑116(4)

Former tenant was automatically converted into a wrongdoer or trespasser, by election of landlords to serve notice of termination of tenancy from month to month which was created at termination of lease. Code Civ.Proc. § 1161.

3. Landlord and tenant 🔑115(1), 291(14)

Provision in lease that any holding over after expiration of a term without consent of landlord should be a tenancy from month to month at monthly rental of $300 referred only to a holding over before, and not after, notice of termination of tenancy and commencement of landlords' unlawful detainer suit, and, hence, could not serve to limit amount of landlords' recovery in the unlawful detainer suit. Code Civ.Proc. §§ 1161, 1174.

◆

Appeal from Superior Court, San Francisco County; James G. Conlan, Judge.

Unlawful detainer action by Frances Greenberg and another against Herman Koppelow and another. From a judgment for plaintiffs, the defendants appeal.

Affirmed.

Charles A. Christin, of San Francisco, for appellants.

Charles N. Douglas and Joseph A. Brown, both of San Francisco, for respondents.

GOODELL, Justice.

In this unlawful detainer action judgment was awarded for the restoration of possession to the plaintiffs, $1,150 damages for wrongful detention, $500 attorney fees, and costs.

The judgment, dated July 18, 1945, shows that the $1,150 was for "damages already accrued at the rate of $500.00 per month commencing May 11, 1945".

On January 17, 1938, the predecessors of respondents, as lessors, and the predecessor and assignor of appellants, as lessee, entered into a written lease of the apartment house in question at 1327 Leavenworth Street, San Francisco, for the term of seven years ending on October 30, 1944 at the monthly rental of $225 for the first two years and $250 for the last five. During the term the respondents purchased the property. The appellants were then in possession as assignees of the original lessee and so continued.

From the expiration of the lease, on October 30, 1944, until the service, on April

9, 1945, of a 30-day notice to quit (as to which notice, its form, timeliness and service, there is no controversy) the appellants admittedly were in possession. The present action is not concerned with the unpaid rent for that intervening period or for any time prior to May 11, 1945, when the 30-day notice expired; other actions deal therewith.

The only question presented for decision is as to the size of the money judgment. The appellants contend that the court was bound to compute the damages at the rate of $300 a month by virtue of the following provision in the lease: "13. Any holding over after the expiration of the term hereof without the consent of Lessor shall be deemed to be a tenancy from month to month at a monthly rental of Three Hundred Dollars ($300.00) and shall continue to be on the same terms and conditions as herein specified."

Section 1161, Code Civ.Proc., provides that "A tenant of real property * * * is guilty of unlawful detainer: * * * When he continues in possession, * * * after the expiration of the term for which it is let to him, without the permission of his landlord * * *." Paragraph 13 of the lease speaks of a holding over "without the consent of Lessor". Because of this coincidence of language between statute and lease the appellants argue that "under the plain and unequivocal language of Section 13 of the lease quoted above, rental damages were restricted to the sum of $300. per month" and, further, that "Section 13 of the lease covers the exact situation existing in the present case, and cannot be construed to cover any other situation. * * * No other situation than the instant one can be conceived where section 13 would have any application * * * the plain and unambiguous language of the contract must be given effect."

[1, 2] The parties to this lease themselves characterized the holding over as "a tenancy from month to month". As long as such holding over was permitted to run on, as it was here, the monthly rental was something about which the parties could contract, but such month to month tenancy was, of course, subject to termination "by the giving of notice by one party or the other, in the manner prescribed by law." 15 Cal.Jur. p. 805. Such notice was given on April 9, and expired on May 11, 1945. That terminated the tenancy. On May 22 respondents filed this action in unlawful detainer, which form of action "does not arise upon contract, but sounds in tort * * *". 15 Cal.Jur. p. 850. By the election of the respondents to serve notice and sue, their former tenant was automatically converted into a wrongdoer (see 32 Am.Jur. 779, citing Blumenberg v. Myres, 32 Cal. 93, 91 Am.Dec. 560) or a trespasser (compare Cowell v. Snyder, 15 Cal.App. 634, 638, 115 P. 961).

[3] An analysis of paragraph 13 of the lease shows that appellants' contention that the $300 provision found in paragraph 13 should be binding on the court as the measure of damages cannot be supported. In the first place it is a contradiction in terms to say that a "holding over * * * without the consent of Lessor" after a 30-day notice has been given and a suit filed can be "deemed to be a tenancy from month to month". Second, such possession after notice and suit cannot possibly call for "rental". It calls for "damages". Sec. 1174, Code Civ.Proc.Third, such erstwhile tenant after becoming a trespasser or wrongdoer can no longer be in possession "on the same terms and conditions" as specified in the original lease. If he could, such tenancy could never be terminated. And yet these three elements—tenancy, rental and similar terms and conditions—were all used in the same sentence in the lease and were interrelated. That they must have been meant to refer only to a holding over before, and not after, notice and suit, is self-evident.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

76 Cal.App.2d 601

LOTTS v. WHITWORTH.

Civ. 15309.

District Court of Appeal, Second District,
Division 1, California.
Oct. 24, 1946.

1. Malicious prosecution 🔑56

In action for malicious prosecution, burden is on plaintiff to establish both malice and lack of probable cause.

2. Malicious prosecution 🔑25(3)

Evidence that civil action was unsuccessful because plaintiff's theory of law was rejected by trial judge is insufficient to establish want of probable cause required to support action for malicious prosecution.

3. Malicious prosecution 🔑25(1)

"Probable cause" for institution of action does not mean legal cause, but means reasonable cause and honest suspicion or belief founded on facts sufficiently strong to warrant average person in believing charge on which action is based to be true.

See Words and Phrases, Permanent Edition, for all other definitions of "Probable Cause".

4. Malicious prosecution 🔑25(2)

Counsel's advice, acted on in good faith, after full and fair disclosure of facts, in bringing action, is complete defense to charge of want of probable cause therefor in subsequent action for malicious prosecution.

5. Malicious prosecution 🔑64(2)

Evidence was insufficient to establish such lack of probable cause for institution of real estate broker's action for commission as to support action against broker for malicious prosecution.

* * *

Appeal from Superior Court, Los Angeles County; H. C. Shepherd, Judge pro tem.

Action by C. D. Lotts against Bob Whitworth for malicious attachment and malicious prosecution of a civil action. Judgment for plaintiff, and defendant appeals.

Reversed.

Harold E. Thomas and W. L. Pollard, both of Los Angeles, for appellant.

Henry L. Walleck, of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal from a judgment for plaintiff in an action for damages based upon an alleged malicious attachment and malicious prosecution of a civil action in the Municipal Court of the City of Los Angeles. The evidence adduced in the court below consisted solely of testimony by each of the attorneys who had represented the respective parties in the original suit which it is claimed was prosecuted by defendant and appellant herein with malice and without probable cause. The trial court also had before it the municipal court record, which was received in evidence "by reference."

The sole question for determination is whether there was presented to the trial court evidence from which the inferences of malice and want of probable cause might properly be drawn.

On March 1, 1943, C. D. Lotts, plaintiff herein, and the defendant, Bob Whitworth, entered into a written agreement whereby Lotts employed Whitworth as his exclusive agent "for a period of 60 days from date hereof, to find a purchaser" for certain real property, and agreed to pay him a 5% commission. The agreement further provided that "should a sale be made within thirty (30) days after the termination of this contract of employment to parties with whom said agent negotiated during its life and said agent notifies me (Lotts) personally or by mail, in writing, of such negotiation, within five days after the termination of this contract, I agree to pay said agent the commission fixed herein."

On June 20, 1943, Lotts sold the property to a Mr. Frost, and on June 25, 1943, Whitworth filed in the Municipal Court of the City of Los Angeles a "complaint for commission," pleading the contract and compliance therewith by him in general terms, and also caused a writ of attachment to be levied upon funds in escrow in connection with the sale. In his affidavit for attachment Whitworth deposed that Lotts was indebted to him upon a written contract.

At the opening of the trial of the municipal court action the defendant therein (plaintiff here) objected to the introduction of any evidence on the ground that "no contract agreement memorandum was produced in writing bearing the signature of the defendant, C. D. Lotts, for that period of time which he claimed a commission." Thereupon, according to the testimony of Whitworth's attorney, the following offer of proof was made on behalf of Whitworth in the municipal court action:

"I stated to the Court at the time of the offer of proof that I held a written contract dated, I believe it was, March 1st, 1943, which ran for a period of sixty days and which had in it a period of thirty days' extension, in which a sale might be made if a sale had been initiated prior to the termination of the sixty-day period. I stated to the court that the sale was actually made some time in early June, * * * and that therefore the written contract had expired by its terms. * * * I offered to prove that prior to the time the written contract expired Mr. Lotts, the defendant in the matter, had told Mr. Whitworth that if he had any sale pending or had any sale that he could get ahold of, to go ahead with it regardless of the written contract. * * * I offered to prove that after the date the contract expired Mr. Whitworth and Mr. Lotts had at least four conferences in which the actual sale that was made was discussed, and in which Mr. Lotts stated to Mr. Whitworth that, 'Well, even though the contract expired, we are gentlemen and we can go ahead with the deal and consummate it and you will get your payment.' I offered to prove to the court that even the day the deal went into escrow that Mr. Lotts and Mr. Whitworth had a conference in which Mr. Whitworth discussed the contract and the sale, and Mr. Lotts said, 'Well, you will get your commission out of it.' The court then ruled that the estoppel could not be used to set off the statute of frauds. No proof was given, and I was barred from making any proof under my offer.

"* * * the gist of my offer of proof was * * * that up until the time the deal went into escrow Mr. Lotts at all times told Mr. Whitworth, 'Well, go ahead with your sale and complete it, and I will take care of you.'"

Mr. Whitworth's attorney further testified, on cross-examination, as follows:

"Q. And isn't it a fact that even taking into consideration the ninety days, the sixty days of the agreement and the thirty-day extension period, that the sale in question had been made beyond that ninety-day period? A. That is true, but to a client whom Whitworth was dealing with during the extension period of thirty days."

He further testified that at the time of the preparation of the complaint and affidavit for attachment his client made a full disclosure of the facts of the case as set forth in his offer of proof.

The testimony given by respondent's attorney, so far as necessary to this decision, was as follows: "That no contract agreement memorandum was produced in writing bearing the signature of the defendant C. D. Lotts, for that period of time which he (Whitworth) claimed a commission, and the court, upon the failure on the part of the plaintiff to produce such a document in writing upon the motion of the attorney for the defendant, dismissed the case, basing the decision upon a violation of the code provision that requires a note or memorandum in writing for the payment of the commission. * * * Our contention now is that the writ of attachment and the complaint are based upon the statement that there was a contract in writing, and on the basis of the fact that he stated that there was a contract in writing, when in truth and in fact he knew there was no contract in writing, he caused a writ of attachment to be issued and caused this money to be tied up and to state a valid cause of action, whereas if he would have alleged the true facts, that there was no contract in writing but it was based upon an oral agreement, that then the complaint would have been subject to a demurrer and would not have been required to go to trial. * * *"

The Municipal Court file which was before the trial court in this cause contains the deposition of Lotts, who denied the conversations alleged in the offer of proof and testified that the purchasers of the property were strangers who were not introduced to him by Whitworth and that Whitworth never notified him, personally or by mail, that he had been negotiating with such purchasers.

[1-5] In an action for malicious prosecution the burden is upon the plaintiff to establish both malice and lack of probable cause. Citizens State Bank of Long Beach v. Hoffman, 44 Cal.App.2d 854, 857, 113 P.2d 221; Richter v. Neilson, 11 Cal.App.2d 503, 508, 54 P.2d 54. That burden was not sustained by the plaintiff and respondent in this action. In substance, all that respondent established was that the prior action was unsuccessful because the theory of law upon which Whitworth's attorney sought to recover was rejected by the trial judge. This alone is insufficient to establish want of probable cause. 34 Am.Jur. 742. "'Probable cause' for the institution of an action does not mean 'legal cause' therefor, because, if it did, every plaintiff who failed to recover in his law suit would be liable to an action for malicious prosecution. 'Probable cause' has sometimes been defined as 'reasonable cause'; and in the case of both civil and criminal prosecutions has been further defined to be an honest suspicion or belief on the part of the instigator thereof, founded upon facts sufficiently strong to warrant the average person in believing the charge to be true." Murdock v. Gerth, 65 Cal.App.2d 170, 178, 179, 150 P.2d 489, 493. Advice of counsel, acted upon in good faith, after a full and fair disclosure of the facts, is a complete defense to the charge that there was no probable cause. Whitworth's attorney testified to facts establishing such defense, and the only evidence to rebut such testimony was the deposition of Lotts, on file in the original municipal court action, to the effect that the alleged conversations referred to in the offer of proof never took place. Whether such conversations actually occurred was not determined in the original suit, nor did respondent offer any evidence of their falsity in the present action. The original cause was disposed of solely on the ground that such conversations, if they took place, afforded no basis for recovery. It must be held, therefore, that such lack of probable cause as is required to support an action for malicious prosecution was not shown in the instant case.

The judgment is reversed.

YORK, P. J., and DORAN, J., concur.

76 Cal.App.2d 618

Ex parte SCARBOROUGH.

Cr. 1984.

District Court of Appeal, Third District, California.

Oct. 29, 1946.

1. Criminal law 🔑258(1)

A city police court's suspension of part of sentence to imprisonment in county jail on stated conditions by provision of judgment imposing sentence was equivalent to order granting probation. Pen.Code, § 1203.1.

2. Criminal law 🔑258(3)

A condition, in judgment imposing sentence of imprisonment in county jail, that it would be suspended in part if defendant left certain city and county and remained away for two years, was void as in effect unlawfully increasing punishment by banishment not provided for by statute. Pen.Code, § 1203.1.

3. Criminal law 🔑258(2)

A judgment, sentencing one pleading guilty of two violations of Vehicle Code to imprisonment in county jail for aggregate term of 360 days, was valid and binding, notwithstanding illegality of portion of judgment suspending last 180 days' sentence on conditions that defendant leave certain city and county and remain away for two years. Pen.Code, § 1203.1; Vehicle Code, §§ 250(a), 502.

4. Criminal law ⚷258(2)

Where portion of judgment imposing sentence of imprisonment and illegal condition of suspension of part of term are severable, void portion may be stricken and disregarded. Pen.Code, § 1203.1.

5. Criminal law ⚷258(1)

Where one sentenced to imprisonment in county jail on pleading guilty of two violations of Vehicle Code had no knowledge of condition in provision of judgment suspending last half of sentence that he should leave certain city and county and remain away for two years, and printed form of parole granted him contained no such condition, revocation of his probation on sole ground of his violation of such condition was illegal. Pen.Code, § 1203.1; Vehicle Code, §§ 250(a), 502.

In the matter of the application of Troy E. Scarborough for a writ of habeas corpus to obtain his release on probation from the San Joaquin County Jail.

Petition's release on probation ordered.

Harold Wyatt, of Stockton, for petitioner.

Joseph C. Tope, City Atty., and H. C. Stanley, Asst. City Atty., both of Stockton, for respondent.

THOMPSON, Justice.

By means of habeas corpus the petitioner seeks to obtain his release on probation from the county jail in San Joaquin County on the ground that his probation was illegally revoked because he violated a provision of the judgment granting probation under Section 1203.1 of the Penal Code, that it would be suspended in part on condition that he leave Stockton and San Joaquin County and remain away for a period of two years. After serving imprisonment for about three months, the defendant was, on April 26, 1946, released on parole. The order granting parole did not contain the provision that the defendant should leave Stockton and San Joaquin County and remain away for two years. The only condition which it contained was that "he go to work immediately * * * and remain sober; that he commit no public offense; * * * that he go to work and support his wife and father." He did not leave Stockton but continued to reside there in his home with his wife and father. After he had been at liberty for four months, he was taken into custody and his probation was revoked for failing to leave and remain away from Stockton. The full term of his commitment has not expired.

February 5, 1946, the petitioner was charged in the Police Court of Stockton, in two counts, with violations of Sections 250(a) and 502 of the Vehicle Code. He pleaded guilty to both offenses and was sentenced to imprisonment in the county jail for the term of 180 days on each count. It was specifically provided the terms for the two offenses should run consecutively. The judgment then provided that the "last 180 days of said judgment suspended on condition that defendant leave the City of Stockton and San Joaquin County after 180 days served and be not found in said City and County for a period of two (2) years from said date."

Petitioner alleged in his application for a writ of habeas corpus that he did not know that his probation was conditioned upon his leaving Stockton for a period of two years. The printed copy of his parole, which was served on the defendant and is attached to the petition, contains no such condition. He did not leave the City of Stockton. On August 29th he was taken into custody and his probation revoked for failure to leave the City of Stockton as provided by said condition in the judgment, and he was recommitted to the county jail to serve the balance of his consecutive terms of imprisonment. It is conceded his probation was not revoked on any other ground.

[1] The suspension of sentence was equivalent to an order granting probation. In re Herron, 217 Cal. 400, 404, 19 P.2d 4; In re Giannini, 18 Cal.App. 166, 122 P. 831.

[2] The condition contained in the judgment that it would be suspended in part if the defendant left Stockton and San Joaquin County and remained away for two years, is, in effect, an unlawful increase of punishment by banishment not provided by statute, and therefore void.

People v. Baum, 251 Mich. 187, 231 N.W. 95, 70 A.L.R. 98; Ex parte Sheehan, 100 Mont. 244, 49 P.2d 438, 442; People v. Lopez, 81 Cal.App. 199, 203, 253 P. 169; 24 C.J.S., Criminal Law, § 1991, p. 1216. In holding that a condition of a judgment requiring banishment from the state is illegal and void, the court said in the Baum case, supra [251 Mich. 187, 231 N.W. 96] that:

"To permit one state to dump its convict criminals into another would entitle the state believing itself injured thereby to exercise its police and military power, in the interest of its own peace, safety, and welfare, to repel such an invasion. It would tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several states which is the basis of the Union itself. Such a method of punishment is not authorized by statute, and is impliedly prohibited by public policy."

In the Lopez case, supra [81 Cal.App. 199, 203, 253 P. 170], the court held that the portion of the judgment of conviction which provided that "defendant is to be deported to Mexico," is void.

The same principle which prohibits the banishment of a criminal from a state or from the United States applies with equal force to a county or city. The old Roman custom of ostracizing a citizen has not been adopted in the United States. The so-called "floating sentence", too frequently resorted to in some inferior courts, falls in the same category. There is no statute in California authorizing such judgments.

[3, 4] It follows that the portion of the judgment in the present case which purports to suspend judgment in part, conditioned on the defendant's leaving Stockton and San Joaquin County and remaining away for the period of two years, is illegal and void. But the balance of the judgment of imprisonment for the aggregate term of 360 days is, nevertheless, valid and binding. People v. Lopez, supra; People v. Fick, 89 Cal. 144, 26 P. 759. Where the judgment of imprisonment and the illegal condition of suspension are severable, as they are in this case, the void portion may be stricken therefrom and disregarded. People v. Lopez, supra. The following language of the judgment in this case, towit: "on condition that defendant leave the City of Stockton and San Joaquin County after 180 days served and be not found in said City and County for a period of two (2) years from said date," will be disregarded.

In Re Peterson, 14 Cal.2d 82, 92 P.2d 890, 891, it was held that the parole of a convict on condition that he submit himself "to the custody of the Texas authorities," in which state he had been previously convicted of a felony and had escaped from state prison and was a fugitive from justice, did not entitle him to parole free from that condition. The rule upon which the Peterson case was decided was that a pardon or parole contemplates an acceptance by the prisoner of the conditions upon which it is granted. 39 Am.Jur., sec. 89, p. 576. The Peterson case did not involve the doctrine of banishment. It merely held that if the prisoner accepted the parole, he must do so on the terms specified that he would submit himself to the custody of the officers of Texas from which state he was a fugitive from justice. That condition of parole merely aided the lawful purpose of returning the prisoner to the custody of the officers of Texas from which he feloniously fled.

[5] In the present case the petitioner asserts that the unlawful and void condition of his probation was not accepted by him; that he had no knowledge of that condition of banishment from Stockton and San Joaquin County; that the printed form of "parole" under which he was granted his freedom from imprisonment contained no such provision. There is no evidence that he accepted that probation with knowledge of that unlawful condition. He remained in Stockton and continued to live in his own home with his wife and father.

We assume the petitioner was granted probation without knowledge of, and free from, the unlawful condition that he leave Stockton and San Joaquin County and remain away for the period of two years. It was stipulated that his probation was revoked on the sole ground that he had violated that condition.

We are of the opinion the petitioner's probation was illegally revoked, and that he is entitled to his freedom on probation unless it is revoked for lawful reasons. It is so ordered.

ADAMS, P. J., and PEEK, J., concur.

76 Cal.App.2d 713

VON ROHR v. NEELY.

Civ. 15392.

District Court of Appeal, Second District,
Division 2, California.
Nov. 6, 1946.

1. Easements ⚷3(1)

A thing is "appurtenant" to something else when incident to, and necessarily connected with use and enjoyment of, principal.

See Words and Phrases, Permanent Edition, for all other definitions of "Appurtenant".

2. Easements ⚷3(1)

"Appurtenances" are things belonging to another thing as principal and pass as incident to the principal thing.

See Words and Phrases, Permanent Edition, for all other definitions of "Appurtenance".

3. Easements ⚷12(2)

Nothing passes by the word "appurtenances" except such rights or privileges as are strictly necessary to proper enjoyment of estate granted, and a mere convenience is not sufficient to create such right or easement.

4. Landlord and tenant ⚷123, 124(1)

What is included in a lease demising houses and a store together with all appurtenances situated on certain lots is a question of fact.

5. Evidence ⚷461(1)

Parol evidence is admissible to show what was said and done after as well as before execution of lease in order to indicate what was intended by parties to be included as an appurtenance, and such evidence is admitted, not for purpose of varying terms of written instrument, but to arrive at intention of parties with reference to subject matter of lease.

6. Evidence ⚷461(1)

Where lease conveyed building together with "appurtenances" for use as coffee shop or lunch room and building was in center of lot and was situated about 32 feet from its front line with unoccupied area of about 30 feet on each side of building, and vacant portion of area was used by lessee's patrons for parking their automobiles, parol evidence that property had been used for many years as a "drive-in" restaurant, that it was so used at time lease was made, and that parties intended that its use should be continued in same manner and for same purpose, was admissible.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Anthony Von Rohr against J. W. Neely to enjoin defendant from continuing his building operations and from interfering with plaintiff's use of property. From a judgment for defendant, plaintiff appeals.

Reversed.

Anderson & Adam and Harvey M. Johnson, all of Los Angeles, for appellant.

Harold M. Davidson, of Alhambra, for respondent.

WILSON, Justice.

This appeal is a sequel of the refusal of the trial court to receive parol evidence for the purpose of revealing the meaning of the term "appurtenances" in a lease.

In June, 1945, respondent's predecessor in ownership executed a lease in writing to appellant for premises described only as "130 East Garvey Boulevard, El Monte, * * * together with the appurtenances" for use as a coffee shop or lunch room. The building is approximately in the center of the lot and is situated about 32 feet from its front line, with an unoccupied area of about 30 feet on each side of the building. The vacant portion of the lot is used by appellant's patrons for parking their automobiles. Appellant maintained a large electric sign on the front of the lot advertising his place of business. The real property was conveyed by the lessor to respondent who, without the consent of appellant, removed the sign and commenced an excavation on the front of the lot in preparation for the erection of a real estate office. Appellant brought this action for the purpose of obtaining an injunction restraining respondent from continuing his building operations and from interfering with appellant's use of the property. From a judgment in favor of defendant plaintiff appeals.

Appellant contends that the vacant area surrounding his coffee shop is included in the term "appurtenances" in the lease, and respondent maintains that the lease covers only the building and the private garage at the rear which is specifically mentioned in the lease.

When the case came on for hearing the trial judge invited counsel for the parties into his chambers where he and counsel discussed the theory of the case. The judge stated that in his opinion "the terms of the lease were clear and were not susceptible to interpretation" and that he would not permit the introduction of any testimony to explain or interpret its provisions. The case was then called in open court where the lease, a sketch of the premises, and photographs were introduced in evidence. Defendant made a motion to exclude any evidence on the ground that the terms of the lease were clear and not subject to interpretation. The motion was granted.

Appellant offered to introduce evidence to show that the property had been used for many years as a "drive-in" restaurant, that it was so used at the time the lease was made, and that it was the intent of the parties that its use should be continued in the same manner and for the same purpose. The court rejected the offer.

[1, 2] Webster's New International Dictionary defines an appurtenance as "that which belongs to something else; * * * something annexed to another thing more worthy." A thing is appurtenant to something else when it stands in the relation of an incident to and is necessarily connected with the use and enjoyment of the principal (McClintic-Marshall Co. v. Ford Motor Co., 254 Mich. 305, 236 N.W. 792, 795, 72 A.L.R. 807; Catterall v. Pulis, 137 Okl. 86, 278 P. 292, 294) and agreeing in its nature and quality with the thing to which it is appendant or appurtenant. Mattix v. Swepston, 127 Tenn. 693, 155 S.W. 928, 930; Shapiro v. Masor, 242 Ill. App. 63, 65. Appurtenances are things belonging to another thing as principal and which pass as incident to the principal thing. Joplin Waterworks Co. v. Jasper County, 327 Mo. 964, 38 S.W.2d 1068, 1076; Whittelsey v. Porter, 82 Conn. 95, 72 A. 593, 596.

[3-5] Nothing passes by the word "appurtenances" except such rights or privileges as are strictly necessary and essential to the proper enjoyment of the estate granted, and a mere convenience is not sufficient to create such a right or easement. Henry v. Breyer, 151 Ill.App. 566, 569. But what is included in a lease demising houses and a store together with all appurtenances situated on certain lots is a question of fact. Fuchs v. Koropp, 151 Ill.App. 612. Parol evidence is admissible to show what was said and done after as well as before the execution of the lease in order to indicate what was intended by the parties to be included as an appurtenance. Such evidence is not to be received for the purpose of varying the terms of the written instrument, but of arriving at the intention of the parties with reference to the subject matter of the lease. Conversations had by appellant with the lessor and with respondent, together with evidence of circumstances and occurrences that will aid the court, may be shown for the purpose of ascertaining whether the things claimed by the lessee were intended to be included as appurtenances. Shapiro v. Masor, supra; Parish v. Vance, 110 Ill.App. 57, 61; Thomas v. Wiggers, 41 Ill. 470, 478; Cleverly v. Cleverly, 124 Mass. 314, 317; Swett v. Shumway, 102 Mass. 365, 368, 3 Am.Rep. 471.

[6] It is obvious that the intent of the parties in using the term "appurtenances" in the lease in question cannot be ascertained from a mere reading of the document. The court was in error in refusing to admit the explanatory evidence tendered by appellant's offer of proof and such other evidence as might have been offered by either party.

It is equally obvious that the extent of the property described by a street number is uncertain. Was it intended that the lessee should have possession of the building and its street frontage and no more, or of a part of or all the surrounding vacant property to be used for parking the automobiles of his patrons? The latter construction would not be unreasonable in view of the difficulty encountered in parking cars in the public streets, but this question as well as the other will be more readily answered when the evidence is heard.

Judgment reversed.

MOORE, P. J., and McCOMB, J., concur.

76 Cal.App.2d 709

In re ROSLAND'S ESTATE.

ROSLAND v. CONSTANTINEAU.

Civ. 15267.

District Court of Appeal, Second District, Division 2, California.

Nov. 6, 1946.

1. Courts 🔑202(1)

All fact issues joined in probate proceedings must be tried in conformity with the rules of practice in civil actions. Probate Code, § 1230.

2. Courts 🔑202(3)

In contested probate matters, court must, as in civil actions, make appropriate findings of fact on all disputed issues, and those findings must be in writing, and, until they are made and filed with the clerk, judgment cannot be entered in absence of a waiver. Probate Code, § 1230; Code Civ. Proc. § 632.

3. Courts 🔑202(3)

Findings of fact in contested probate matters may be included in order or decree and are not required to be in a separate document. Probate Code, § 1230; Code Civ.Proc. § 632.

4. Executors and administrators 🔑194(5½)
Homestead 🔑150(1)

Order setting apart exempt personalty and probate homestead to surviving husband of deceased for life was sustained by findings that notice of time and place of hearing the petition of husband had been regularly given as required by law, that inventory and appraisement had been returned and filed, that realty described in order and set apart as homestead to husband was separate property of deceased, that no homestead had been selected during deceased's lifetime, that personalty set apart was exempt from execution, and that husband was surviving husband of deceased. Probate Code, §§ 660 et seq., 1230; Code Civ.Proc. § 632.

5. Executors and administrators 🔑194(6)
Homestead 🔑150(1)

In making order, during proceedings for probate of deceased wife's estate, setting aside exempt personalty and a probate homestead to deceased's surviving husband for life, court was not required to include in its findings, findings regarding husband's life expectancy or financial needs. Probate Code, §§ 660 et seq., 1230; Code Civ. Proc. § 632.

6. Executors and administrators 🔑194(5½)
Homestead 🔑150(1)

Order, made during proceedings for probate of deceased wife's estate, setting apart exempt personalty and a probate homestead to surviving husband for life, was not invalid because court's findings, on which order was based, were not served on opposing counsel prior to signing of the order, where court did not direct preparation of the findings by either party, since statute providing for service is merely directory, and since service of findings is not required where the court does not direct their preparation by either party. Code Civ.Proc. § 634.

7. **Courts** ⚷202(5)
Executors and administrators ⚷194(7)

Though court, prior to entering an order setting apart exempt personalty and a probate homestead to a surviving husband of a deceased, gives direction to one of the parties to prepare findings on which the order is to be based, failure to serve the findings on counsel of the opposing party will be disregarded on appeal in absence of a showing of prejudice. Code Civ.Proc. § 634; Const. art. 6, § 4½.

8. **Courts** ⚷202(5)
Executors and administrators ⚷194(7)

Where all jurisdictional facts were recited in order, made during proceedings for probate of estate, setting apart exempt personalty and a probate homestead to deceased's surviving husband, and findings were in accord with the evidence, opposing party was not prejudiced by absence of service of findings on his counsel prior to the signing of the order. Code Civ. Proc. § 634; Const. art. 6, § 4½.

9. **Executors and administrators** ⚷194(6)
Homestead ⚷150(1)

Court did not abuse its discretion in probate proceedings in setting apart exempt personalty and a probate homestead to deceased's surviving husband for his lifetime, rather than for a shorter period, though property had been devised to deceased by her niece, and the parties had been married less than three years at time of deceased's death and had no issue, and husband was not in need. Probate Code, § 660 et seq.

◆

Appeal from Superior Court, Los Angeles County; Atwell Westwick, Judge.

Proceeding in the matter of the estate of Irene Porter Rosland, deceased. From an order setting apart exempt personalty and a probate homestead to Oscar E. Rosland, petitioner, the surviving husband of the deceased, for a period of his natural life, Felix J. Constantineau, contestant, appeals.

Order affirmed.

John J. Beck, of Los Angeles, for appellant.

F. D. R. Moote, of Los Angeles, for respondent.

WILSON, Justice.

From an order made during the proceedings for the probate of the estate of Irene Porter Rosland pursuant to section 660 et seq. of the Probate Code, setting apart exempt personal property and a probate homestead to Oscar E. Rosland, the surviving husband of decedent, for the period of his natural life, the executor of the estate has appealed, presenting three points as grounds for the reversal of the order.

[1-3] 1. *Are the findings of fact contained in the order sufficient?* All issues of fact joined in probate proceedings must be tried in conformity with the rules of practice in civil actions. Prob.Code, sec. 1230. In contested probate matters the court is required, as in civil actions, to make appropriate findings of fact on all disputed issues. Estate of Baird, 59 Cal. App.2d 303, 305, 138 P.2d 698; Estate of Pendell, 216 Cal. 384, 385, 14 P.2d 506; Estate of Pala, 55 Cal.App.2d 647, 649, 131 P.2d 593; Estate of Burton, 63 Cal. 36, 37. They must be in writing (Code Civ.Proc., sec. 632) and if not waived judgment cannot be entered until they are made and filed with the clerk. Estate of Dodds, 52 Cal. App.2d 287, 289, 126 P.2d 150; Brownell v. Superior Court, 157 Cal. 703, 707, 109 P. 91. Findings of fact may be included in the order or decree and are not required to be in a separate document. Estate of Janes, 18 Cal.2d 512, 514, 116 P.2d 438; Estate of Exterstein, 2 Cal.2d 13, 15, 38 P. 2d 151; In re Sharp, 41 Cal.App.2d 79, 84, 106 P.2d 244; In re Bensfield, 102 Cal. App. 445, 448, 283 P. 112; Estate of Woodburn, 212 Cal. 683, 686, 300 P. 22; Estate of Clifford, 16 Cal.App.2d 123, 126, 60 P. 2d 302; Kemp v. Campbell, 9 Cal.App.2d 298, 300, 49 P.2d 872; Hopkins v. Warner, 109 Cal. 133, 139, 41 P. 868; Covell v. Lee, 69 Cal.App. 1, 3, 230 P. 208.

[4, 5] In the order appealed from the court found the following facts: (a) That notice of the time and place of hearing the petition had been regularly given in the

manner and for the period required by law; (b) that the inventory and appraisement had been returned and filed; (c) that the real property described in the order and set apart as a homestead to respondent was the separate property of decedent; (d) that no homestead had been selected during the lifetime of decedent; (e) that the personal property set apart is exempt from execution; (f) that respondent is the surviving husband of decedent. These are the only facts that are required to sustain the order. It was not necessary that the court make findings regarding respondent's life expectancy or his financial needs.

[6, 7] 2. *Was the service of findings on opposing counsel necessary?* To appellant's objection that findings were not served on him prior to the signing of the order there are two answers: (1) Section 634 of the Code of Civil Procedure is merely directory and the fact that proposed findings were not served on appellant five days before they were signed does not impair the validity of the judgment. Treat v. Superior Court, 7 Cal.2d 636, 639, 62 P. 2d 147; Noland v. Noland, 44 Cal.App.2d 780, 784, 113 P.2d 11; Bradford v. Southern California Petroleum Corp., 62 Cal. App.2d 450, 462, 145 P.2d 36; Crawford v. Lambert, 136 Cal.App. 617, 619, 29 P.2d 428; Sadicoff v. Jackson, 46 Cal.App. 256, 189 P. 111; Manfre v. Sharp, 210 Cal. 479, 482, 292 P. 465. (2) Service of findings is not required where the court does not direct their preparation by either party (In re Sharp, supra; Hoffman v. Guy M. Rush Co., 27 Cal.App. 167, 168, 149 P. 177; Bainbridge v. Lachenmaier, 123 Cal.App. 560, 564, 11 P.2d 671), and though the court gives such direction failure to serve them before they are signed will be disregarded on appeal in the absence of a showing of prejudice. Const. Art. VI, sec. 4½; Miller v. Murphy, 186 Cal. 344, 350, 199 P. 525; In re Sharp, supra; Baker v. Eilers Music Co., 175 Cal. 652, 656, 166 P. 1006; In re Bensfield, 102 Cal.App. 445, 449, 283 P. 112.

[8] Since all jurisdictional and necessary facts are recited in the order and since the findings are in accord with the evidence, appellant was not prejudiced by the absence of service.

[9] 3. *Did the court abuse its discretion in setting the property apart for the maximum period allowed by law?* Section 661 of the Probate Code provides that if the property was the separate property of the decedent the court can set it apart for a limited period, and in no case beyond the lifetime of the surviving spouse. Appellant's contention that the court abused its discretion in setting the property apart for respondent's lifetime and in failing to shorten the maximum period by allowing credits for equities claimed to have been shown to exist is based on his partial statement of the facts shown by the record, to wit, that the property had been devised to decedent by her niece; that respondent and decedent, at the date of the latter's death, had been married only two years and eight months and had no issue; that the husband was not in need; that there was no evidence as to his age or life expectancy. In addition to the facts stated by appellant the evidence shows that during their marriage respondent supported decedent and gave her all checks received by him for his wages amounting to $67 each week, out of which she allowed him $5; with his separate funds he paid a mortgage of $813 on the home; he paid the expenses of her funeral and last illness amounting to $332.82; about five months before her death he gave her all the money they had on hand for the expense of a trip on which she went alone; an automobile listed as part of the assets of the estate, appraised at $600, was paid for out of his earnings. The facts warranted the order and the court did not abuse its discretion in making it.

Order affirmed.

MOORE, P. J., and McCOMB, J., concur.

76 Cal.App.2d 701

PEOPLE v. DAVIS et al.

Cr. 4043.

District Court of Appeal, Second District, Division 2, California.
Nov. 1, 1946.

As Corrected Nov. 13, 1946.

1. Larceny ⚿65

Evidence that defendants shot and killed a heifer which they encountered on a road, that they severed the hindquarters and attempted to load them in their automobile, justified conviction of grand theft. Pen.Code, §§ 484, 487.

2. Larceny ⚿23

Defendants, who killed a heifer on a country road at night while returning from a hunting trip and attempted to escape with the severed hindquarters, were properly charged with grand theft, and were not required to be charged under statute prohibiting the killing of such animal while hunting upon the inclosed lands of another. Pen.Code, §§ 384c, 484, 487.

3. Larceny ⚿23

Defendants who deliberately killed a heifer belonging to another and attempted to escape with the severed hindquarters were guilty of grand theft, rather than petty theft, under the statutes. Pen.Code, §§ 484, 487, 487a, 488.

4. Criminal law ⚿661

In prosecution for theft of a heifer, failure of trial court to require the introduction of the records of defendants' statements taken by the undersheriff and the prosecuting attorney was not error where no request for the introduction thereof was made by defendants.

5. Criminal law ⚿400(3)

The recording of an extrajudicial statement of an accused person is not required to be either transcribed or introduced, but the testimony of competent witnesses to such utterances is sufficient to prove the fact.

◆

Appeal from Superior Court, Ventura County; Charles F. Blackstock, Judge.

Donald Davis, Lloyd Davis, and Robert Smith were convicted of stealing a heifer, and Donald Davis and Robert Smith appeal.

Affirmed.

Wm. G. Junge, of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Having been accused by information of stealing a white-faced heifer, defendants were all convicted by the court, trial by jury having been expressly waived. Inasmuch as Lloyd Davis failed to prosecute his appeal, for convenience his codefendants only will be hereinafter referred to as appellants. They now urge the (1) insufficiency of the evidence, (2) want of proof of the corpus delicti and (3) failure to make a finding of grand theft as grounds for reversal.

Donald is a brother of Lloyd Davis. On April 12, 1945, with Robert Smith they drove in an automobile from Culver City along Coast Highway 101. Ostensibly they were out to hunt wild game but after reaching Ventura County they "got off the road back in the hills." While traveling down Decker Road in the vicinity of Hidden Valley they encountered a young bovine. With his Mauser rifle Donald shot the animal between the eyes. Working in the dark, with two hunting knives the trio severed the hindquarters and loaded them into their car. Just then one John Spiers, keeper of the boats at Lake Sherwood, approached the scene. It was 11:00 p.m. as Lloyd turned on his lights and, alone, drove rapidly up Carlysle Road. Having pursued the retreating car about two miles Spiers met it returning. He demanded an explanation of Lloyd and made an examination of the rear compartment where he found the rifle and the two blood-covered knives. Lloyd followed Spiers back to the home of Tom Moody, a fire captain, where they arrived at about 11:40. Leaving Lloyd in the custody of one Zeimer, Moody's assistant, the captain accompanied Spiers to the point where he had first observed the car of defendants and there discovered the forequarters of the calf. Moody then returned to his home and placed Lloyd under arrest.

In answer to the questions of the officer, Lloyd admitted ownership of the gun but denied knowledge of the knives or of the origin of the blood and hair on them. He asserted that he had picked up two sailors who had driven while he slept, only suddenly to awake to find that he was parked alone in a field. Officer Stephens with Moody and John Meders, ranch superintendent of the Albertson Company, owner of the calf, then drove three miles over the course driven by Lloyd in his flight and discovered the hindquarters. The brand was identified by Meders and Mr. Albertson. Officer Foye proceeded then with Lloyd to the jail at Ventura, observing the boy's clothing covered with blood.

About 3:45 a. m. on Highway 101 Foye saw appellants hitchhiking, their trousers wet to the thighs. Having been apprehended at his radioed suggestion, they were immediately brought into consultation with their codefendant, Undersheriff Suytar and deputies of the District Attorney. Their statements were taken on a recording machine. Lloyd stated that after the heifer had been killed and the three were loading the hindquarters into the car the lights on Spiers' machine hove into view; that appellants promptly sought refuge in the wilds as he alone drove up the road and dumped his cargo at some distance from his course of travel and that as he was returning he was stopped by Spiers. The statements of appellants successively made to the officers were substantially the same as those made by Lloyd, except that Donald declared that he had shot the animal between the eyes with his rifle, and he and Smith with their knives "hacked off the hindquarters" and loaded them into their automobile, and that they wished to pay for the animal.

[1] The foregoing is substantially the total of the evidence received at the examining trial, no objection having been interposed to any portion thereof. Each defendant stated to the court that he had no witness to testify in his behalf and did not desire to take the stand. Thus the evidence of their theft was complete in that it established their felonious taking of the personal property of another. Penal Code, sec. 484. They were armed with a gun capable of killing a bovine and with knives of sufficient strength and sharpness to dissect its body. They drove in the night-time into a rural region, the desolation of which was marred only by the victim of Donald's gun. They killed it and near midnight were surprised in the act of loading its hinder parts into a vehicle whereby they might speedily depart from the scene of their crime. Such facts, unsupported by a confession, evince a felonious intent to steal. However, they were emphasized by the voluntary statements made to the officials.

[2] Appellants now contend that the animal was killed while they were hunting and the crime was therefore only a misdemeanor under section 384c, Penal Code. But that statute is a part of Title X, having to do with "Crimes against the Public Health and Safety." Its purpose is to prevent the killing, maiming, or wounding of animals "while hunting upon the inclosed lands of another." Appellants were not hunting upon inclosed lands or at all. They were driving along an open country road at night when they deliberately killed the calf with gunfire and disemboweled and halved it on the spot.

[3] Clearly the authors of the information accusing appellants had in mind the language of Penal Code, section 487. While section 484 makes it a theft to take the chattel of another with felonious intent, section 487 provides that if the taking is "an automobile, * * * any bovine animal, * * * or pig" it is grand theft. For the purpose of overcoming that provision appellants assert that nothing was taken away by them, and that if there was any crime committed by Lloyd it was only a violation of section 488, a misdemeanor. By such contention appellants ignore section 487a which makes it grand theft feloniously to steal or transport the carcass of a bovine. That statute is a recent enactment, evidently designed to facilitate the conviction of those engaged in high-jacking and

black-marketing. Prior to the enactment of Section 487a in order to convict one of a felony for taking a carcass it was essential to prove that its value exceeded $200. Since the passage of that statute all offenders who take away any carcass are guilty of grand theft. But the conviction of appellants was not that of transporting the hindquarters from one point on an open road to a lonely spot off that road, but for taking away from its owner a bovine animal and depriving such owner of the use and property thereof. Such felonious taking may be done by leading, carrying or driving a bovine from its shelter or inclosure or from the public domain. Also, it may be taken from its owner's possession by removing it in pieces or by eating it or by cremating it with gasoline or an atomic bond. Deprivation of a living bovine from the owner with felonious intent is grand theft under Section 487, and that is exactly what appellants did to the owner of the white-faced heifer when they killed it on the dark Ventura-County road. People v. Salorse, 62 Cal. 139, 142.

[4, 5] The assignment is made that the court erred in not requiring the introduction of the records of defendants' statements taken by the undersheriff and the prosecuting attorney. That question was not presented to the trial court. It cannot therefore be criticized for failing to do what it was not asked to do. The only evidence received by the trial court was that introduced in the Justice's Court. After the record made by the examining magistrate was by stipulation submitted to the superior court the latter could in no respect modify such record. It was as complete as appellants desired it to be. No law is known to this court which requires that the recording of an extra-judicial statement of an accused person be either transcribed or introduced. The testimony of competent witnesses to such utterances is sufficient to prove the fact.

The suggestion that the court failed to find that the crime was grand theft is negated by the judgment itself which implies such finding. Supporting the implication is the evidence of a midnight slaughter of a bovine without its owner's consent in a locale remote from the paths and haunts of law-abiding men.

Judgments affirmed.

McCOMB and WILSON, JJ., concur.

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76 Cal.App.2d 693

KEANE v. PENHA.

Civ. 15482.

District Court of Appeal, Second District,
Division 2, California.
Nov. 1, 1946.

1. **Infants** 🔑110

Whether client was entitled to disaffirm a contract made during her infancy with attorneys and whether assignee of attorneys was entitled to recover sum provided by contract were questions to be determined upon a trial of action, rather than on motion to set aside a default. Code Civ.Proc. § 473.

2. **Infants** 🔑108

Default judgment rendered against an infant was without significance in absence of a showing that judge was advised of defendant's infancy.

3. **Infants** 🔑87

A default judgment taken against an infant defendant without appointment of a guardian was required to be set aside where the infant disaffirmed the default two weeks after attaining her majority by marriage and but 20 days after the entry of the judgment and plaintiff was not prejudiced by the delay. Civ.Code, § 25; Code Civ. Proc. §§ 372, 373.

4. **Infants** 🔑90

When an infant is a defendant in an action, he must appear either by his general guardian or by a guardian ad litem appointed by the court in which action is pending. Code Civ.Proc. § 372.

5. Infants ⚷87

Where an infant is not duly represented as provided by law at time judgment is entered against her, she has an absolute right of disaffirmance which continues throughout minority and until barred by laches after she has attained age of majority. Code Civ.Proc. §§ 372, 373.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Melvin J. Keane against Grace E. Penha to recover on an assigned claim for legal services performed. From an order granting defendant's motion to set aside an order of default and judgment against her, plaintiff appeals.

Affirmed.

Haas and Home, and John D. Home, all of Los Angeles, for appellant.

Macdonald and Pettit by Thomas H. McGovern and Albert W. Leeds, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiff appeals from an order granting defendant's motion to set aside the order of default and the judgment against her. The grounds of the motion were (1) that the default and judgment were entered through her mistake, inadvertence, surprise, and excusable neglect; (2) that defendant has disaffirmed the default and judgment for the reason that they were entered while she was a minor and she did not appear by a guardian.

On March 15, 1945, defendant entered into a contract whereby she employed the firm of attorneys, Keane and Collins, assignors of plaintiff, to protect her interests in the estate of Maude T. Belknap who had deceased in the state of Massachusetts. She agreed to pay assignors 25 per cent of her inheritance for their legal services to be rendered in connection with the estate. Thereafter assignors performed certain services prior to September 26, 1945, when by writings defendant disaffirmed her contract with the attorneys and discharged them from further connection with the Belknap estate. On January 17, 1946, defendant was served with summons and complaint in the instant action whereby plaintiff as assignee of his firm demanded $12,500 for the services alleged to have been performed. Judgment by default was entered upon such demand on February 1, 1946. On that day defendant was six months less than 20 years of age.

The greater portion of defendant's supporting affidavit consists of allegations designed to show that she was entitled to be relieved from the default and judgment by reason of her excusable neglect and inadvertence. Code Civ.Proc. sec. 473. Inasmuch as the second issue presented by the motion is readily susceptible of demonstration only such portion of her testimony as might apply to her right of disaffirmance follows:

"To the best of my knowledge and belief said contract has never been approved by any court * * * in any State in which any litigation pertaining to the Belknap estate was pending. * * *

"I have never had a guardian appointed for my person or estate, and no guardian ad litem was appointed to represent me in the above entitled action. I have fully and fairly stated all of the facts of the case to my attorneys, Albert W. Leeds and Thomas H. McGovern, and after such statement am advised by said attorneys that I have a good and substantial defense on the merits."

In response to that portion of defendant's affidavit relative to her disaffirmance of the default and judgment the affidavit of plaintiff concludes with the following:

"The contract, it is true, was not approved by any court for the reason that it was not a contract that required approval of any court. No guardian or guardian ad litem was ever appointed for the reason that during the time Miss Penha was represented by Messrs. Keane & Collins none was required. That at the time of the default hearing in the above entitled matter before the Honorable Henry M. Willis, Judge Presiding affiant was called upon to, and did, in fact, testify in detail to the services that were rendered Miss Penha pursuant to the agreement of March 15, 1945, and as partially referred to herein and it was after a careful consideration of this testimony that the court fixed the reasonable value thereof as set forth in the judgment herein."

[1, 2] Whether defendant was entitled to disaffirm the contract with the attorneys or whether plaintiff was entitled to recover the sum provided by the contract are questions to be determined upon a trial of this action. It may be observed, however, that the default judgment rendered by Judge Willis is without significance in the absence of a showing that he was advised of defendant's infancy.

[3] Defendant's default was entered on January 29 and judgment was entered on February 1, 1946. She was married on February 7 thereby attaining her majority. Civ.Code, sec. 25. She filed her disaffirmance of the default and the judgment on February 21 on the ground of her infancy on the dates of her default and of the judgment. Such prompt action spells that kind of diligence which entitles the actor to every equitable consideration. Her motion for relief was filed on the twentieth day after entry of judgment and within two weeks after the removal of her disabilities. No detriment is shown to have been suffered by plaintiff as a result of such delay. She was therefore entitled to the benefits of the general rule relative to a minor's disaffirmance of a judgment as declared in both statute and decision.

[4, 5] When an infant is defendant in an action he must appear either by his general guardian or by a guardian ad litem appointed by the court in which the action is pending. Code Civil Proc. sec. 372. It is the general rule that an omission to cause the appointment of a guardian if there be none is fatal to all subsequent steps taken in the action. Code Civ.Proc. sec. 373. The exceptions to such rule establish the soundness of the principle therein embodied. Unless a minor is "duly represented as provided by law" at the time a judgment is entered against him his right to disaffirm such judgment "continues until barred by laches after the minor has attained the age of majority." Gouanillou v. Industrial Accident Commission, 184 Cal. 418, 420, 193 P. 937, 938. Such a judgment is voidable and may be disaffirmed. Hughes v. Quackenbush, 1 Cal.App.2d 349, 362, 37 P.2d 99. The right of disaffirmance by a minor of a judgment rendered voidable by the fact that he was not represented by a guardian in the action is absolute (Johnston v. Southern Pacific Co., 150 Cal. 535, 538, 89 P. 348, 11 Ann.Cas. 841), and such right continues throughout his minority. See Pacific Coast Joint Stock Land Bank of San Francisco v. Clausen, 8 Cal.2d 364, 365, 65 P.2d 352; Childs v. Lanterman, 103 Cal. 387, 390, 37 P. 382, 42 Am.St.Rep. 98; Neilson v. Walker, 105 Cal.App. 23, 27, 286 P. 1091.

The fact that a minor's disaffirmance of a judgment is sometimes denied does not impair the virtue of the general rule. Such exceptions were due to the minor's conduct which was deemed to have been tantamount to a ratification after overcoming his infirmities. But in the instant case the behavior of defendant was not similar to that of the minor in any of the exceptional cases. In King v. Wilson, 116 Cal.App. 191, 2 P.2d 833, the minor was past 20 years of age. He answered, announced ready and sat through the trial without informing the court or his counsel of his minority. His substantial rights did not suffer. In Childs v. Landerman, 103 Cal. 387, 37 P. 382, 42 Am.St.Rep. 121, the infant filed his answer and was represented throughout the trial by attorney Stephen M. White. He attained his majority one day before the judgment was filed. Instead of seeking relief on the ground of irregularity or want of authority in the attorney to appear for him he moved for a new trial, thereby submitting to the court's jurisdiction. His application to vacate the judgment was wholly without right. In Foley v. California Horseshoe Co., 115 Cal. 184, 47 P. 42, 56 Am.St.Rep. 87, because of an error in the original order appointing a guardian ad litem the court made a new order at the trial. Such was a proper exercise of jurisdiction.

The order is affirmed.

McCOMB and WILSON, JJ., concur.

76 Cal.App.2d 697

JOHNSON, Inc., v. WARDEN.

Civ. 15518.

District Court of Appeal, Second District, Division 2, California.

Nov. 1, 1946.

Hearing Denied Dec. 23, 1946.

1. **Municipal corporations 🔑982**
   Records 🔑9(13)

In action to quiet title, tax deed from county tax collector to city, which recited prior conveyance of land to state for nonpayment of taxes, termination of right of redemption and grant of property to city, and tax deed from city tax collector to plaintiff, which deed was certified by registrar of titles, together with proof of levy of city's tax under proper authority, proved transfer of title from city to plaintiff. Revenue and Taxation Code, §§ 3517, 3791, 3810, 3841; Code Civ.Proc. §§ 1919, 1951.

2. **Municipal corporations 🔑982**

Plaintiff, in quiet title action based upon acquisition of title by tax deed from city, in order to show a clear title was required to show that title was legally vested in the state as city's grantor.

3. **Records 🔑9(13)**

Certificate of title issued by registrar of titles certifying that state was owner of an estate in fee simple in described property prior to conveyance to city, which in turn conveyed to plaintiff, in absence of contradictory evidence, was some proof of state's ownership and operated to show a complete chain of title in plaintiff as against claims of delinquent taxpayer. Revenue and Taxation Code, §§ 3791, 3810, 3841; Code Civ.Proc. §§ 1919, 1951.

4. **Records 🔑9(13)**

Where register of land titles, by entry, disclosed that title to land in question was vested in state prior to conveyance to city, which in turn conveyed to plaintiff, defendant delinquent taxpayer must introduce proof to defeat the prima facie case established by the register, and, in the absence of such evidence, plaintiff was entitled to have his title quieted by virtue of a valid title deraigned from the state. Gen.Laws, Act 8589, § 42.

5. **Constitutional law 🔑278(1)**
   Records 🔑9(2)

Statutory provision that register of titles may contain prima facie proof of ownership is not a denial of due process nor an unwarranted invasion of property rights of a landowner in light of presumption that a public official has regularly performed his duty. Gen.Laws, Act 8589, § 42; Code Civ.Proc. § 1963, subd. 15; U.S.C.A.Const. Amend. 14.

6. **Constitutional law 🔑278(1)**
   Records 🔑9(2)

The fact that the Land Title Act clothes the registrar with power to determine whether a conveyance vests title in transferee does not confer upon him such judicial power as would violate due process clause. Gen.Laws, Act 8589; U.S.C.A. Const. Amend. 14.

7. **Evidence 🔑90**
   Property 🔑1, 12

The power of state to regulate modes of acquiring and transferring land and to make uniform and impartial changes in rules of evidence as to burden of proof is practically unrestricted.

8. **Constitutional law 🔑285**
   Records 🔑9(2)

Section of Land Title Act which authorizes registrar, upon the filing of tax deed to state, to cancel existing certificate for the land described in such deed and to issue a new certificate to purchaser, is not violative of due process. Gen.Laws, Act 8589, § 81; U.S.C.A.Const. Amend. 14.

◆

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Johnson, Inc., against Charles P. Warden to quiet title to certain lot to which plaintiff held a tax deed. After defendant's death, Grace P. Warden, as executrix of defendant's estate, was substituted as a party defendant. From a judgment for plaintiff, executrix appeals.

Affirmed.

J. Everett Brown, of Los Angeles, for appellant.

Donald J. Dunne, of Los Angeles, for respondent.

MOORE, Presiding Justice.

As holder of a tax deed conveying three lots in tract 10509 in Los Angeles County, respondent sued Charles P. and Grace P. Warden to quiet its title in the property. Charles having deceased after filing his answer, Grace as his executrix defended the action but defaulted in her individual capacity. She appeals from an adverse judgment.

[1, 2] The evidence of respondent consisted solely of recorded documents. The first of these was a "tax deed" dated June 22, 1940, from the County Tax Collector to the city of El Monte which instrument recites (1) the prior conveyance of the lots to the State for the non-payment of taxes; (2) the termination of the right of redemption, see sec. 3791, Revenue and Taxation Code, and (3) the grant of the property to the city of El Monte. The second instrument was the "tax deed" dated July 13, 1940, from the Tax Collector of El Monte to respondent which recites the former conveyances, termination of the right of redemption as provided by section 66, Ordinance 4, of the city, the consideration paid by respondent for the property, and the grant thereof. Both instruments were certified by the Registrar of Titles of Los Angeles County. The levy of the city's tax on the property was proved, Code Civil Proc. secs. 1919 and 1951, to have been authorized by section 66 of Ordinance 4 of El Monte and the conveyance to respondent was directed by a resolution of the City Council.

[3] Such proceedings, directions and conveyance are authorized by sections 3791, 3810, 3841 of Revenue and Taxation Code, formerly sec. 3897d et seq., Pol.Code, and prove the transfer of title from the city to respondent. To show a clear title vested in respondent it was essential to show that title was legally vested in the city's grantor, to wit, the state. Happily this was done by appellant's introducing in evidence the "certificate of title" issued by the Registrar of Titles. That document dated September 17, 1936, certifies that the state is "the owner of an estate in fee simple" in the described property. It is some proof of the state's ownership as provided by Section 42, Land Title Law, Act 8589, Deering's General Laws which is as follows: "Register of land conclusive as evidence. The register of any land, and duly certified copies thereof, shall, except as herein otherwise provided, be received in law and in equity as evidence of the facts therein stated, and as conclusive evidence that the person named therein as owner is entitled to the land for the estate of interests therein specified." Its contents not having been contradicted by any evidence the record shows a complete chain of title in respondent.

Appellant's contention is that want of proof of conveyance to the state or of the process by which it acquired its asserted title is fatal to respondent's cause, citing Swann v. Carson, 56 Cal.App.2d 502, 132 P.2d 863, and other authorities which hold the tax deed itself without proof of the steps whereby the taxpayer's title was transferred to the state is insufficient to establish title in the grantee. The answer to such contention is supplied by law. The execution of the "deed to the State" referred to as indispensable to the proof of title in him who asserts ownership by virtue of the tax deed in the cases cited by appellant (Swann v. Carson, supra; Jones v. Luckel, 174 Cal. 532, 163 P. 906; County Bank of San Luis Obispo v. Jack, 148 Cal. 437, 83 P. 705, 113 Am.St.Rep. 285; McArthur v. Goodwin, 173 Cal. 499, 160 P. 679; Bublitz v. Reeves, 40 Cal.App. 75, 180 P. 28) was proved by the registrar's certificate which recites that the State of California was owner in fee of the property involved.

[4] It is objected that hearsay recitals in the deed to El Monte are not competent proof of their contents. Granting the truth of such objection, still the language of section 42, supra, makes certified copies of the register of land titles "evidence of the facts therein stated." After the register had proved that title was vested in the state prior to the conveyance to El Monte it was incumbent upon appellant to introduce proof to defeat the prima facie case established by the register. Such evidence not having been received it was thereby established that respondent held a valid title deraigned from the state.

[5-8] While there may be serious question as to that part of section 42 which attempts to make the register of land titles "conclusive evidence" that the person named therein as owner is entitled to the land for the estate or interests therein specified, yet it is neither a denial of due process of law nor an unwarranted invasion of the property rights of a land owner to provide by statute that the register of titles may contain prima facie proof of ownership. There is a presumption that a public official has regularly performed his duty. Code Civ.Proc. sec. 1963, subd. 15. Because by the Land Title Act the registrar is clothed with power to determine whether a conveyance vests title in the transferee no such judicial power is thereby conferred upon him as would violate the due process clause of the 14th amendment to the federal Constitution. The power of the state to regulate the modes of acquiring and transferring land and to make uniform and impartial changes in the rules of evidence as to the burden of proof is practically unrestricted. People v. Simon, 176 Ill. 165, 52 N.E. 910, 915, 44 L.R.A. 801, 68 Am.St.Rep. 175; Arndt v. Griggs, 134 U.S. 316, 10 S.Ct. 557, 33 L.Ed. 918; Cage v. Caraber, 125 Ill. 447, 17 N.E. 777. The due process clause is not infringed by section 81 of the Act which authorizes the registrar upon the filing of the tax deed to the state to cancel the existing certificate for the land described in such deed and to issue a new certificate to the purchaser. People v. Simon, supra. Inasmuch as the State has full control over the procedure of its courts (People v. Hickman, 204 Cal. 470, 478, 268 P. 909, 270 P. 1117), that portion of section 42, supra, which authorizes the receipt of the register as evidence of the facts recited in its contents established title in the state prior to its conveyance to El Monte. Therefore the evidence supports the judgment.

The instant proceeding is not concerned with the events preceding the conveyance of the land to the state or with the tax deed itself. Had that deed been introduced instead of the register it would have proved the regularity of the tax levy, nonpayment, delinquency, sale, non-redemption and sale for the correct sum. Revenue and Taxation Code, Sec. 3517; Boyer v. Gelhaus, 19 Cal.App. 320, 323, 125 P. 916. But the registrar's certificate having been introduced by defendant and because it is valid prima facie proof of the state's ownership, a complete chain of title showing the land vested in respondent was established.

The authorities, supra, cited by appellant related to situations where the deeds containing the recitals of delinquency, sale and conveyance were recorded. They did not involve a consideration of the procedure in the case of registered titles.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

76 Cal.App.2d 716

LONG v. LONG.

Civ. 15520.

District Court of Appeal, Second District,
Division 2, California.

Nov. 6, 1946.

Hearing Denied Dec. 23, 1946.

1. Execution 🔑73

On application for issuance of execution to enforce judgment more than five years after entry thereof, trial court has discretion to determine whether applicant stated sufficient reasons for failure to enforce judgment within five years. Code Civ.Proc. §§ 681, 685.

2. Appeal and error 🔑983(3)

On appeal from order granting application for issuance of execution to enforce judgment more than five years after entry thereof, only question to be considered is whether trial court abused its discretion in determining whether applicant stated sufficient reasons for failure to enforce judgment within five years. Code Civ.Proc. §§ 681, 685.

3. Divorce ⚷263

The allowance of divorced wife's application for issuance of execution to enforce judgment for alimony which had been accumulating for 14 years was not abuse of discretion, where wife was without means to search for husband during such period but was recipient of county relief and she had enlisted aid of county officials to assist her in locating husband to no avail. Code Civ.Proc. §§ 681, 685.

4. Execution ⚷73

Diligence, but not extreme diligence, is required in attempting to enforce judgment, but mere lapse of time or judgment creditor's failure to take action to collect judgment within five years after entry thereof is not in itself sufficient ground for denial of judgment creditor's motion to enforce judgment more than five years after entry thereof, and the mere fact that at some time during the five-year period subsequent to entry of judgment the judgment debtor had property that could have been levied on is not a sufficient reason for denial of motion. Code Civ.Proc. §§ 681, 685.

5. Divorce ⚷261, 311

A judgment awarding support for wife or child, or both, is enforceable after five years on showing of sufficient reason for failure to enforce within such period, notwithstanding that the amount awarded is payable periodically for indefinite term. Code Civ.Proc. §§ 681, 685.

6. Equity ⚷72(1)

"Laches" in legal significance is not mere delay, but delay that works a disadvantage to another, and the doctrine can be invoked only where by reason of plaintiff's acts the allowance of the claim would work an unwarranted injustice.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

7. Divorce ⚷247

A husband's second marriage, the legality of which was uncertain, did not impair husband's duty to support wife, and if valid did not exempt husband from paying support money to wife as ordered in interlocutory divorce decree obtained by wife.

Appeal from Superior Court, Los Angeles County, Alfred E. Paonessa, Judge.

Divorce action by Bessie R. Long against Charles Long. From an order directing the issuance of execution to enforce judgment for alimony, the defendant appeals.

Order affirmed.

Goldwater & Murcell, of Oakland, William Ellis Lady, of Los Angeles, and George F. Sharp, of Oakland, for appellant.

Jones and Wiener, of Los Angeles, for respondent.

WILSON, Justice.

[1, 2] Feeling aggrieved by being required to satisfy a just obligation as the result of an order made pursuant to section 685 of the Code of Civil Procedure directing the issuance of an execution to enforce a judgment for alimony that has been accumulating for more than 14 years, none of which has been paid, defendant has appealed from the order. Since it is within the discretion of the court to determine whether the applicant for the issuance of an execution has stated sufficient reasons for having failed to proceed under section 681 (Sec. 685, supra; Corcoran v. Duffy, 18 Cal.App.2d 658, 64 P.2d 735; Shields v. Shields, 55 Cal. App.2d 579, 582, 130 P. 2d 982;) and since the court, in the exercise of its discretion, has determined that the reasons given therefor are sufficient, no question concerning the order arises unless the court has abused its power. McNabb v. McNabb, 47 Cal.App.2d 623, 627, 118 P.2d 869; McClelland v. Shaw, 23 Cal.App.2d 107, 109, 72 P.2d 225. Therefore the only question before us is whether the court properly exercised its discretion in finding that the affidavits presented a sufficient excuse for respondent's delay beyond the period of five years in applying for an execution.

On February 11, 1931, respondent filed her complaint seeking a divorce from appellant on the ground of cruelty. Defendant filed his answer on February 25. After a hearing on an order to show cause at which both parties and their attorneys were present the court made an order on March

5, 1931, directing appellant to pay respondent $10 per week for her support. Payments were made as required by this order until October, 1931, when appellant departed for Arkansas. An interlocutory decree of divorce was entered on March 14, 1932, in which appellant was ordered to pay plaintiff the sum of $10 per week for her support until further order of the court, and the community property of the parties was awarded to respondent. On June 10, 1932, respondent filed an affidavit for an order directing defendant to show cause why he should not be punished for contempt by reason of his failure to make any payment on account of alimony and to deliver possession of the community property awarded to her by the interlocutory decree. Apparently the order was not served since there is no evidence of service in the record. On November 22, 1932, she filed a similar affidavit on which an order to show cause was issued and personally served on appellant, returnable on December 8. On the latter date appellant did not appear, a bench warrant was ordered, and an attachment for his arrest was issued. The attachment was delivered to the sheriff on December 9, but by reason of appellant's absence from the state, as will hereinafter appear, he was not taken into custody until February 16, 1934. On that date the order to show cause in re contempt came on for hearing, defendant being present with his attorney. The hearing of the order was continued until February 28, appellant was released on his own recognizance and was instructed to return on that date. On the latter date neither appellant nor his counsel appeared, and a bench warrant was ordered to issue for his apprehension. The warrant was never served. Appellant, according to his affidavit, was absent from the state from February to October, 1934.

On November 16, 1945, respondent filed a notice of motion for an order for the issuance of an execution pursuant to section 685 of the Code of Civil Procedure for the total amount that had accrued under the decree, accompanied by an affidavit setting forth the amounts due and unpaid, and stating the reasons for her failure to have an execution issued sooner.

Counter affidavits were filed on behalf of appellant and after a hearing the court, on March 11, 1946, made an order granting respondent's motion and directing the issuance of an execution. It is from the latter order that the appeal is taken.

[3] In respondent's affidavit, after setting forth her efforts made through contempt proceedings, as above outlined, to compel appellant to comply with the interlocutory decree, she states that she was forced to apply to the County of Los Angeles for relief; that she enlisted the aid of county officials to assist her in locating appellant and that they were unable to obtain any information concerning his residence, business, or assets; that she was without funds with which to employ persons to search for him; that from 1935 to 1942 she was "on relief" under the Works Progress Administration, and during that time her case history was in the hands of said administration; that in 1942 her "case" (for public aid) was transferred to the Failure to Provide Department of the County of Los Angeles; that all efforts made by the public officials to ascertain the whereabouts of appellant and of any assets belonging to him were unsuccessful; that subsequently to 1942 she received information that appellant was residing in Sacramento; that an attorney in that city was consulted, but appellant departed before he could be served with judicial process and before any assets belonging to him could be located; that in 1944 she learned of his residence in Oakland and thereafter ascertained that he was possessed of property within the jurisdiction of the court subject to execution. Respondent's affidavit satisfies the burden resting upon her under section 685 and shows sufficient diligence in her endeavor to find appellant and his property during the five-year period following the entry of the judgment and thereafter until her application for a writ of execution was filed.

In resistance to respondent's attempt to collect her judgment appellant filed an affidavit containing allegations outlined as follows (contemporaneous occurrences not contained in the affidavit being in parentheses): That in October, 1931 (after having filed his answer in this action, thereby submitting himself to the jurisdiction of the court) he established his residence in Arkansas (payments required by the preliminary order ceased at this date), where on March 21, 1932, he secured a decree of divorce from respondent (she had obtained an interlocutory decree one week previously in the instant case); that on April 23 of that year, one month after the alleged Arkansas divorce, he married another woman; that in May following he returned to Los Angeles County where he resided until February, 1934 (at this time he was apprehended under the bench warrant); that he then obtained employment outside California for about eight months (this was when he failed to appear after having been released on his own recognizance); that in June, 1935, he established a residence in Sacramento where he engaged in a business owned and operated by him and known as Long's Bakery; that thereafter he acquired real and personal property in Sacramento, including automobiles and delivery trucks which were registered with the Division of Motor Vehicles under the names of Charles Long and Lyland Long, the latter being the woman whom he married after procuring the alleged divorce in Arkansas; that he was registered as a voter in Sacramento, and that his name was listed in the telephone directory and in the city directory of that city as well as with the City License Department; that he was also listed in the assessor's and tax collector's offices of both the City and the County of Sacramento, and also with the State Board of Equalization as an employer; that he was well known to the bakery trade and to suppliers of wholesale bakery goods; that since 1940 he has resided and maintained his business in Oakland where he has been similarly registered in directories and in public offices. Respondent states in her affidavit that when she ascertained his whereabouts he left Sacramento before she could proceed against him.

The briefs do not refer to anything in the other affidavits and we have found nothing that would add to appellant's defense against the order.

[4] Diligence is required, but not extreme diligence, in attempting to enforce a judgment. The mere lapse of time is not in itself a sufficient ground for the denial of respondent's motion. Welk v. Conner, 102 Cal.App. 286, 287, 282 P. 963; Faias v. Superior Court of Alameda County, 133 Cal.App. 525, 529, 24 P.2d 567; Harlan v. Harlan, 154 Cal. 341, 343, 98 P. 32; Doehla v. Phillips, 151 Cal. 488, 494, 91 P. 330. The failure of a judgment creditor to take action to collect a judgment within five years after its entry is not a ground for refusing to grant a motion for the issuance of an execution, Butcher v. Brouwer, 21 Cal.2d 354, 357, 132 P.2d 205; Doehla v. Phillips, supra, 151 Cal. at page 495, 91 P. 330; Demens v. Huene, 89 Cal.App. 748, 752, 265 P. 389, and the fact that at some time during the five-year period subsequent to the date of entry of judgment appellant may have had property that could have been levied on pursuant to section 681 is not a sufficient reason for a denial of relief under section 685. Demens v. Huene, supra, 89 Cal.App. at page 754, 265 P. 389; Palace Hotel Co. v. Crist, 6 Cal.App.2d 690, 694, 45 P.2d 415. See also Water Supply Co. v. Sarnow, 6 Cal.App. 586, 588, 92 P. 667. Orders have been sustained for the issuance of executions after 20 years (Weldon v. Rogers, 159 Cal. 700, 115 P. 464); after 19 years (Peers v. Stoll, 32 Cal.App. 2d 511, 90 P.2d 119); after 16 years (Troendle v. Clinch, 74 Cal.App.2d 480, 169 P.2d 55; McClelland v. Shaw, 23 Cal. App.2d 107, 72 P.2d 225); after 14 years (Bredfield v. Hannon, 151 Cal. 497, 91 P. 334; Doehla v. Phillips, 151 Cal. 488, 91 P. 330; Helvey v. Castles, 73 Cal.App.2d 667, 167 P.2d 492); after 13 years (Welk v. Conner, 102 Cal.App. 286, 282 P. 963); after 12 years (Mohr v. Riccomi, 14 Cal. App.2d 416, 58 P.2d 659; Corcoran v. Duffy, 18 Cal.App.2d 658, 64 P.2d 735; Crowley v. Superior Court of Alameda County, 17 Cal.App.2d 52, 61 P.2d 372).

[5] The fact that this judgment is for amounts payable periodically for an indefinite term is not a defense. Judgments awarding support for the wife or children, or both, are enforceable after five years. Harlan v. Harlan, 154 Cal. 341, 98 P. 32; Saunders v. Simms, 183 Cal. 167, 190 P.

806; Crowley v. Superior Court of Alameda County supra; McNabb v. McNabb, 47 Cal.App.2d 623, 118 P.2d 869; Shields v. Shields, 55 Cal.App.2d 579, 130 P.2d 982.

[6] The doctrine of laches can be invoked only where by reason of plaintiff's acts the allowance of the claim would work an unwarranted injustice. Hovey v. Bradbury, 112 Cal. 620, 625, 44 P. 1077. Laches in legal significance is not mere delay, but delay that works a disadvantage to another. Carr v. Sacramento Clay Products Co., 35 Cal.App. 439, 449, 170 P. 446; Demens v. Huene, supra, 89 Cal.App. at page 754, 265 P. 389; Cahill v. Superior Court of City & County of San Francisco, 145 Cal. 42, 46, 78 P. 467, 469. It is only stating a truism to say that one who is able to do so should pay his debts. Appellant does not deny his financial ability; on the contrary, his affidavit discloses his ownership of property of great value. Notwithstanding this fact he has systematically avoided payment for 14 years, during which time respondent was without means with which to search for him. He has flouted the court and has absented himself from the state on two occasions to avoid the consequences of his disobedience of the court's orders. He now reveals no valid excuse for his failure to discharge his legal obligation. No reason appears why in equity and good conscience he should not be required to pay what he justly owes. "In determining what will constitute such unreasonable delay, regard will be had to circumstances which justify the delay, to the nature of the case and the relief demanded, and to the question whether the rights of the defendant, or of other persons, have been prejudiced by such delay." Cahill v. Superior Court, supra.

[7] Appellant presents as a defense to the payment of the judgment the fact that he has remarried and that such property as he now possesses is the community property of himself and his present wife. He contends that these facts are circumstances which would justify the court in denying respondent's right to recover the amount due under the judgment. The unsoundness of this defense is twofold: (1) The validity of the alleged decree of divorce that he obtained in Arkansas and as a consequence the legality of his second marriage are matters of such uncertainty that we do not regard his present status to be of such significance as to impair in the slightest degree respondent's right to be paid her due. Appellant went to Arkansas after he had filed his answer in the instant case and had become subject to the jurisdiction of the California courts; the interlocutory decree was granted to respondent prior to the decree in Arkansas; he married and returned to California immediately after obtaining his purported decree. The filing of the divorce action in Arkansas so soon after arriving there and his quick return to California give rise to serious doubt as to the bona fides of his residence in Arkansas. (2) His second marriage, conceding its validity, does not exempt him from providing the support to respondent that the court ordered him to pay. His responsibility is not extinguished by his acquisition of an additional wife.

Respondent acted with such diligence as was within her power. Government and county officials assisted in her endeavor to find appellant, but without result. She should not be penalized for failure to do more than the record reveals to have been done. Appellant was not led to change his position by the delay, and he was not prejudiced thereby. His own conduct was the cause of respondent's inability to satisfy her judgment sooner. His affidavit shows the value of his property to have been sufficient to enable him to pay the amount due many years ago. The exercise of sound discretion requires the enforcement of the judgment.

Order affirmed.

MOORE, P. J., and McCOMB, J., concur.

PEOPLE v. MAXFIELD et al. *

Civ. 15291.

District Court of Appeal, Second District, Division 2, California.

Nov. 1, 1946.

Hearing Granted Dec. 23, 1946.

1. Taxation 🔑725

The fact that deed to state issued at tax sale becomes null upon issuance of a redemption receipt is intended to mean that state's every demand upon the property is complied with when all taxes, interest, and penalties incurred by delinquent taxpayer have been paid, and the redemption leaves no right in the property remaining in state. Revenue and Taxation Code, §§ 3652, 4102–4104, 4107, 4112, 4113.

2. Taxation 🔑679(3)

The title conveyed by tax sale to state is not such as is vested in a private purchaser, since object on part of state is not to acquire the property but to collect the taxes which have been levied. Revenue and Taxation Code, §§ 3652, 4102–4104, 4107, 4112, 4113.

3. Taxation 🔑699

It is the policy of the law to grant delinquent taxpayer such extensions and delays as will render least onerous the burden of citizenship and at same time return to tax rolls such properties as may have been sold for taxes. Revenue and Taxation Code, §§ 3652, 4102–4104, 4107, 4112, 4113.

4. Taxation 🔑739

The state was not entitled to rent, issues, and profits earned or collected by former owner of lands conveyed to state in satisfaction of delinquent taxes for such period between date of the deed and date of redemption. Revenue and Taxation Code, §§ 3652, 4102–4104, 4107, 4112, 4113.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by the People of the State of California against James Maxfield, Maxfield Wilton & Associates, Residential Income Properties, Inc., and others, for an accounting as to rents, issues, and profits earned or collected by former owner of land conveyed to state in satisfaction of delinquent taxes; such rents and profits having been received by the redemptioner between the date of the deed and the date of redemption. From a judgment of dismissal, the plaintiff appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., and E. G. Benard, Deputy Atty. Gen., for appellant.

Kenneth W. Kearney, of Los Angeles, for respondents.

MOORE, Presiding Justice.

The question for decision is whether the State is entitled to the rents, issues and profits earned or collected by the former owner of land conveyed to it in satisfaction of delinquent taxes, such rents and profits having been received by the redemptioner between the date of the deed and the date of redemption. To the second amended complaint demanding an accounting by the taxpayer for such moneys the court below sustained a demurrer without leave to amend. The appeal is from the ensuing judgment of dismissal.

The pleading alleged that on July 1, 1943, the Tax Collector by deeds conveyed five parcels of land situate in Los Angeles County to the State of California for nonpayment of delinquent taxes and that the deeds were recorded in the official records of that county; that the five parcels were redeemed in full on divers dates in the months of February, May and June, 1944; that during the period after the conveyance to the State and prior to the dates of redemption "defendants and each of them were the former owners * * * or were in actual or constructive possession of said parcels of real property; that said defendants and each of them took the rents, issues and profits from said parcels * * * during the periods as aforesaid, and have at all times retained said rents, issues and profits," the exact amount and value thereof so taken being unknown to plaintiff.

[1] Appellant contends that the state became the absolute owner of the lands and that by virtue of section 3652 of the Rev-

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* Subsequent opinion 183 P.2d 897.

enue and Taxation Code the Controller or any person designated by him is authorized to exact an accounting of the proceeds from tax-deeded property by the former owner, or by any person in possession or having an interest in such lands. Appellant fails to recognize the full significance of sections 4107 and 4112, same code. Section 4107 provides that the redemption receipt issued to the redemptioner on payment of all moneys necessary to redeem (Secs. 4102, 4103, 4104) has when recorded the same effect as a deed of reconveyance, and section 4112 provides that "on redemption, the deed becomes null and any interest acquired by virtue of the sale to the State ceases." Section 4113 authorizes a redemptioner to bring suit against the state to quiet title to the land redeemed. The very fact that the deed to the state becomes null upon the issuance of the redemption receipt is clearly intended to mean that the state's every demand upon property is complied with when all taxes, interest and penalties incurred by the delinquent taxpayer have been paid. Furthermore, since the statute renders void a deed held by the state it is inconceivable that any sort of action could be based thereon. It is not made void in part or after a particular period, but by redemption is made null for all times. The redemption leaves no rights remaining in the state. List v. Sandell, 42 Cal.App.2d 505, 508, 109 P.2d 376.

[2-4] The purpose of selling real property to the State for delinquent taxes is not to enable the State to engage in the business of farming or in any other enterprise incident to land. The title conveyed by such sale to the state is not such as is vested in a private purchaser. The object on the part of the State is not to acquire the property. See Anglo California National Bank of San Francisco v. Leland, 9 Cal.2d 347, 353, 70 P.2d 937. Such sale is a mere link in the process of collecting taxes which have been levied for the sustenance of the state. That the sale is not intended to operate excessive hardship upon the taxpayer is indicated by the amount of time allowed before sale to the State and by the modicum of penalties and interest exacted from those in default. It is the policy of the law to grant the delinquent taxpayer such extensions and delays as will render least onerous the burden of citizenship and at the same time to return to the tax rolls such properties as may have been sold for taxes. People v. Gustafson, 53 Cal.App.2d 230, 127 P.2d 627. For the state to levy taxes, provide penalties for delinquencies, which are most likely to occur in years of meagre or no productivity, then to add interest and more penalties in event of sales to the state and thereafter to exact the earnings of the taxpayer on the land in a season of abundance, would smack of a tyranny not usually nurtured by constitutional provisions or by judicial decisions. To disturb the long cherished ideal of liberty in the enjoyment of property without equivalent gains for security would be such a diversion from the tenor of freedom commonly enjoyed as to forbid the experiment.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

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76 Cal.App.2d 740

BRYANT v. MARSTELLE.

Civ. 15300.

District Court of Appeal, Second District,
Division 1, California.
Nov. 8, 1946.

1. Appeal and error 🔑931(3)

Where findings have been waived, on appeal all reasonable inferences will be drawn from the evidence, and the most favorable construction will be drawn therefrom to support the judgment.

2. Licenses 🔑44(2)

Where agreement by which defendant was permitted to occupy plaintiff's garage was not made upon a consideration of rent, so that occupancy was manifestly not under a lease, defendant occupied under a license.

3. Licenses ⚷43

A "license", in respect to real estate, is an authority to do a particular act, or series of acts, on another's land, without possessing any estate therein.

See Words and Phrases, Permanent Edition, for all other definitions of "License."

4. Licenses ⚷58(1)

A mere license to use land may be revoked at any time at the pleasure of licensor except, where licensee has expended, in execution of license, money or its equivalent in labor in reliance upon license, his rights under license will continue for so long a time as the nature of it calls for when right under license is not specifically restricted.

5. Licenses ⚷59

Under evidence that defendant was given a license to use garage as a habitation while she was preparing for medical college and that license was specifically restricted to a term not exceeding two years, owner, as licensor, had a right to revoke license at any time after expiration of two year period.

6. Licenses ⚷51

Where defendant occupied plaintiff's garage as a habitation under a license from plaintiff, and municipal authorities asserted that such occupancy violated zoning ordinance and demanded that plaintiff evict defendant under pain of criminal action, defendant's rights as licensee did not impose on plaintiff obligation of securing an adjudication nullifying demand of municipal authorities.

7. Licenses ⚷59

Where time of defendant's occupancy of plaintiff's garage as a habitation under a license was specifically restricted to not more than two years and defendant had been permitted to continue in possession for nearly five years, plaintiff, to obtain possession, was not required to rely upon validity of a demand of municipal zoning authorities to cause the garage to be vacated, although such demand upon plaintiff impelled plaintiff to request defendant to move.

8. War ⚷4

Where plaintiff permitted defendant to occupy garage as a habitation under a license for nearly five years without rent, and, in plaintiff's action for possession after termination of license, the evidence relating to reasonable rental value went to question of damages for holding over after notice to vacate and award against defendant was designated as damages, rent regulations of the Office of Price Administration were inapplicable.

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Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Elizabeth E. Bryant against Kanau Marstelle to recover possession of certain premises and to quiet title thereto wherein defendant sought certain affirmative relief. From a judgment for plaintiff, defendant appeals.

Affirmed.

John Van Aalst, of Los Angeles, for appellant.

Daniel A. Knapp, of Los Angeles, for respondent.

WHITE, Justice.

By her amended complaint, containing two causes of action and filed herein, plaintiff alleged in her first cause of action that she was the owner of certain described improved real property in the city of Los Angeles; that on or about February 10, 1940, she "permitted the defendant to occupy * * * an apartment located over a garage" on the real property here in question; "said premises to be held and possessed by defendant for a period of two years without rental"; and that as a condition precedent to said tenancy "defendant voluntarily agreed to install plumbing, etc., in said premises and repair and remodel the roof and walls thereof". It is then alleged that prior to the 20th day of November, 1944, plaintiff was served with a notice from the Planning Commission of the City of Los Angeles requiring her to conform to the provisions of section 13.04 of the Los Angeles Municipal Code by causing the upper floor of said garage, occupied by defendant, to be forthwith vacated.

That on November 20, 1944, plaintiff served on defendant a written notice to vacate said premises on December 21, 1944. Said notice to vacate specified as the ground therefor, that the further occupancy of said premises by defendant was in violation of the foregoing Los Angeles Municipal Code provision. That defendant failed and refused to remove from said premises and that at the time this action was instituted remained in possession and occupancy thereof.

By her second cause of action, plaintiff sought to quiet title in herself to the property in question.

Defendant filed an answer in which she admitted that plaintiff permitted her to occupy the premises above referred to but denied that the terms of such occupancy were as set forth in plaintiff's amended complaint, and generally denied the other allegations therein contained. As a separate defense, defendant alleged that, on February 10, 1940, she was a medical student, and "well acquainted with the profession and science of nursing the sick"; that on and before the last mentioned date the parties hereto were acquainted with each other, and that plaintiff, "desiring from time to time to make use of the professional qualities of the defendant, and the plaintiff from time to time accommodating ailing, sick and elderly people in her own home as patients, and wishing to avail herself of the valued services of the defendant", offered defendant the living facilities aforesaid. That defendant "at the special instance and request of the said plaintiff, did agree that the said defendant would, at her own cost and expense, refurnish, recondition, and rebuild those certain premises mentioned herein, and if the said defendant did so improve the said premises so as to make them livable and inhabitable then the said defendant would have the use of said premises as a place for study and living, for her own use and purpose, to do with, to use and occupy, and to hold possession thereof as long as the defendant saw fit to do so." It is then alleged that pursuant to the aforesaid oral agreement, defendant spent the sum of approximately $1,500 "in rebuilding, redecorating, reconditioning and in installing plumbing and sanitation devices and appliances * * *."

Defendant prayed that the court decree that she "has a present and existing right to retain and occupy the said premises as a place of abode and for study as long as the defendant desires to do so"; and that the court find that she did spend the aforesaid sum of $1,500 upon the portion of the premises occupied by her; that in event the court determined that her occupancy of that portion of the premises in the rear of the property would be a violation of the above mentioned municipal ordinance, that the court find the reasonable value of the use of said portion of the property from February 10, 1940, to the date of the trial, and that defendant have judgment for the difference between the sum so determined and the sum of $1,500 expended by defendant, as aforesaid.

Following trial before the court, sitting without a jury, and the waiver of findings, the court entered judgment for the plaintiff, quieting title in her to the property in its entirety, and that "defendant be and hereby is required to forthwith remove from said premises, and it is further ordered that a Writ of Assistance issue out of the above named Court to enforce the same.

"It Is Further Ordered, Adjudged and Decreed that plaintiff have and recover from defendant the sum of one hundred ninety dollars ($190.00) as damages arising from her holding over that portion of said premises set forth in the notice to vacate, dated November 20th, 1944, and accruing subsequent thereto, with interest thereon at the rate of seven per cent (7%) per annum until paid, together with plaintiff's costs and disbursements incurred in this action amounting to the sum of $20.25."

Defendant does not dispute plaintiff's title to the property and appeals only from that portion of the judgment as set out above in quotation marks.

As grounds for reversal, appellant urges:

"I. That the evidence is insufficient to show an agreement between appellant and respondent respecting the term of occupancy by the appellant; that the tenancy was to terminate upon completion of appellant's medical course in Los Angeles.

"II. That this case does not involve a lease between the parties, nor a tenancy at will or at sufferance, but a license, coupled with a consideration.

"III. That Section 13.04, Los Angeles Municipal Code, has no application to appellant's case herein at issue.

"IV. Respondent is estopped from collecting rent for failure to register housing accommodations with O. P. A."

[1] Where, as here, findings have been waived, it is axiomatic that all reasonable inferences will be drawn from the evidence, and that the most favorable construction will be drawn therefrom to support the judgment. Benjamin Moore & Co. v. O'Grady, 9 Cal.App.2d 695, 699, 50 P.2d 847.

Bearing this rule in mind, with reference to the nature of the agreement of the parties hereto, we find in the record evidence given by the plaintiff in part as follows:

"A. When I took her over to the property and she saw the lay of rooms and she saw the condition of the garage, and when we got back to the house where I was living, she wanted to know if I would let her fix the garage up so that she could use it, the next two years, at least, for she was preparing herself for a course of study in chemistry at Berkeley and that she had to make her credits, she wanted to have a quiet place to study in. And I asked her, I asked her how much she thought it would cost and she said not too much if I would let her use the second-hand flooring that Mr. Hunt, who was an architect, had left there when I bought it, that she didn't think it would run $350. But I thought it would run more than that. But she said no, that —Marstelle said no, that she could get a second-hand bath tub in that and kitchen fixtures, and the stool; and her greatest expense would be to connect the sewerage about 35 feet from the building; that the light and the gas fixtures and the water run to the first floor and she would only have to take them up from there." Plaintiff further testified that the defendant paid her no rent, performed no services whatever for her, and that plaintiff paid the utility bills such as gas, water and light.

With further reference to the term defendant was to occupy the quarters in question, plaintiff testified: "She (defendant) said it would take her at least two years, maybe; she said it might be less but she said she didn't think it would be".

Although the testimony given by the defendant was in direct conflict with much of plaintiff's testimony and was that plaintiff told her that she could have the quarters in question "as long as I wanted", nevertheless, plaintiff's testimony furnished a basis for the court to have found that the agreement between the parties was that defendant was to occupy the premises for the term of her medical course prior to her entry into the College of Medicine at Berkeley, but not to exceed two years, provided that at her own expense she installed certain facilities and reconditioned said premises. In the absence of findings it will be presumed that the court did so find, and that the judgment would be supported by a finding that plaintiff did not orally agree with defendant that the latter "would keep the garage until I had finished my medical and then I would return to her without removing any of the fixtures * * *, that I could have it as long as I wanted", as testified to by defendant.

[2-4] Defendant contends that the relationship between her and the plaintiff was not one of landlord and tenant but of licensor and licensee. It being undenied that the agreement was not made in consideration of rent, manifestly it was not a lease. Dean v. Brower, 119 Cal.App. 412, 415, 6 P.2d 580. We may therefore accede to appellant's contention that she was in possession under a license, which, in respect to real estate, is defined in Emerson v. Bergin, 76 Cal. 197, 201, 18 P. 264, 266, as "an authority to do a particular act, or series of acts, on another's land, without possessing any estate therein". And the same case is authority for the statement that "a mere license may be revoked at any time at the pleasure of the licensor".

[5] However, appellant urges, and correctly so, that this rule is not without its modifications and exceptions. Where the

licensee has expended in the execution of the license, money or its equivalent in labor, in reliance upon the license, his rights under the license "will continue for so long a time as the nature of it calls for". Stoner v. Zucker, 148 Cal. 516, 520, 83 P. 808, 113 Am.St.Rep. 301, 7 Ann.Cas. 574. But the same case, 148 Cal. at pages 519, 520, 83 P. at page 810, 113 Am.St.Rep. 301, 7 Ann.Cas. 574, furnishes authority for the statement that such exception to the general rule is applicable only when a right under a license is not specifically restricted, in which event the right "is commensurate with the thing of which the license is an accessory", and will continue "for so long a time as the nature of it calls for". In the instant case there was substantial evidence to support a finding that "the nature of the license" was for appellant to use the premises as a habitation while she was "preparing for a Berkeley medical course" and was "specifically restricted" to a term, fixed, according to respondent's testimony, by appellant herself, as not more than two years. Hence, assuming that appellant entered upon the premises as a licensee, respondent had a right to revoke the license, under the general rule, at any time after the expiration of the two-year period.

Appellant next contends that section 13.04 of the Los Angeles Municipal Code, referred to in respondent's notice to vacate as the basis of such notice, has no application to the case at bar. It is appellant's contention that under the city ordinance, respondent's structures having been in existence at the time the applicable restrictive provisions of the ordinance were adopted, came within the purview of certain provisions of such zoning ordinance which exempted therefrom "a nonconforming building, structure or improvement * * * which lawfully existed on any lot or premises at the time the first zoning regulation became effective with which such building, structure, or improvement did not comply in every respect."

Appellant asserts that respondent's notice to vacate was based upon a mistake of law, and, that respondent could have successfully resisted any attempt to prosecute her under the penal provisions of the ordinance which made a violation of its terms a misdemeanor.

[6, 7] In giving notice to respondent that in permitting the upper floor of the garage to be occupied she was guilty of a misdemeanor, and requiring her to within 15 days cause said premises to be vacated, the Los Angeles Municipal Planning Commission contended that two families were occupying the premises in a zone restricted to single family residence. True, respondent might, after long and possibly expensive litigation, obtain a judicial adjudication nullifying the demand made upon her by the municipal authorities. But we do not view the rights of a licensee under the facts herein, as imposing upon the licensor any such obligation. Furthermore, as heretofore pointed out, the time of appellant's occupancy under the license was "specifically restricted" to not more than two years, and was permitted to continue for nearly five years. Therefore, respondent was not required, in order to terminate appellant's occupancy of the premises, to rely upon the demand of the municipal authorities to cause the premises occupied by appellant to be vacated. There was substantial evidence that the limited term of the license had long since expired when the notice to vacate was served.

[8] Finally, appellant urges that "respondent, before claiming rents due her, cannot determine monthly rental of premises without conforming to O. P. A. regulations". This contention, urged for the first time on appeal, is evidently predicated on that portion of the judgment awarding respondent "the sum of one hundred ninety ($190.00) dollars as damages arising from her holding over that portion of said premises set forth in notice to vacate, dated November 20, 1944, and accruing subsequent thereto". Appellant's claim in this regard is without merit. It is conceded that no rent whatever was asked for or collected from appellant during the nearly five years of occupancy by her of the premises up to the date of service upon her of the notice to vacate. Upon the trial, the only evidence relating to the rent went to the question of damages, and the court permitted testimony

as to rental value of the premises from the date which appellant was required under the notice to surrender the premises, viz, December 21, 1944, which, it was testified, was $20 per month, unfurnished. This testimony went solely to the measure of damages, and, as recited in the judgment, the award based upon such testimony was particularly designated "as damages". Manifestly, the rent control regulations or rules promulgated by the Rent Control Division of the OPA have no application thereto.

We find no error in the record, and the judgment appealed from is affirmed.

YORK, P. J., and DORAN, J., concur.

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76 Cal.App.2d 587

PETERSON v. TWENTIETH CENTURY FOX FILMS.

Civ. 15338.

District Court of Appeal, Second District, Division 1, California.

Oct. 22, 1946.

Workmen's compensation 🔑205, 2159

An enlisted navy man, by carrying out orders of his superior officer to assist in production of moving picture, did not thereby become a "special employee" of moving picture company within compensation act so as to preclude maintenance of common-law action against company for injuries sustained in explosion of a bomb which had been used to add realism to one of scenes depicting landing of Marines on Guadalcanal. Labor Code, § 3201 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Employee".

◆

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by Donald C. Peterson, a minor, by his mother, Iola I. McDowell, guardian ad litem, against Twentieth Century Fox Films, a corporation, to recover for injuries sustained by plaintiff. From a judgment for plaintiff, defendant appeals.

Affirmed.

Schell & Delamer, of Los Angeles, for appellant.

Marion P. Betty, of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal from a judgment on the verdict, whereby plaintiff recovered $15,000 for injuries sustained by him under the following circumstances:

Respondent Peterson enlisted in the United States Navy in September of 1942, and at the time of his injury had the rating of motor fireman first class. Appellant was engaged in the production of a motion picture called "Guadalcanal Diary," and to add realism to one of the scenes which depicted the landing of marines, charges of explosives, known as "bombs" or "ash cans," were dropped overboard from a boat and detonated. On July 1, 1943, respondent was instructed by his commanding officer, Lieutenant Scoffield, to report at the dock where his boat was moored and follow further instructions which would be given to him there. After respondent reached the dock, he received no further instructions from the Navy, and all the orders he took were given to him by representatives of appellant. Respondent was unaware that he was to work on a motion picture until he reached the dock, where he was met by a representative of appellant who told him to take his boat out, maneuver around an inactive boat, which was about a quarter of mile from shore in the boat basin at Oceanside, California, unload some men from the inactive boat into his own boat, and take off. In accordance with such instruction, respondent boarded a 36 foot Higgins craft, accompanied by his crew of two men and two men from 20th Century Fox, named Chapman and McLaughlin, and proceeded to the inactive boat, circled it and unloaded approximately sixteen marines from that boat into his own boat and started south toward San Diego. Respondent testified that: "When we got about 20 or 30 yards away from the inactive boat was when we were supposed to push the charge off * * * at that time * * * I had the boathook in my hand from pulling alongside the other boat * * * and I was told to push the first charge off, which I did * * * with the boathook. * * * I was curious and I looked back * * * and I saw Mr. Chapman kneeling down over the battery with the wire in his hand and then I looked back at the bomb and it blew up and sent water up into the air. * * * almost immediately after that they said "push the second one off" * * * and I did, and I no sooner got it off the side than the boat went up * * * I mean the charge of dynamite blew over on the side of the boat. * * * At that time I was dazed and I remember being thrown from where I was standing, halfway over the side and somebody pulling me back in. * * * From then on I don't remember a thing until I was in the sick bay."

It was only a couple of seconds between the two explosions, the second of which caused respondent severe injuries, and occurred from 15 to 30 minutes after he had reported at the dock. The first bomb was detonated by touching the two points of the battery to the wires leading to the bomb. The second bomb exploded prematurely, the cause of such explosion being unknown. To the questions put by a juror and the court, respectively: "Who placed the charges, did the Navy boys place the charges or did the men from the studio? * * * Who placed the charges on the boat? Who prepared them, the Navy men or the studio men?" the respondent replied: "The Navy didn't have a thing to do with it; it was all done by the 20th Century Fox."

Only one ground of appeal is urged, i.e.: "that the evidence established as a matter of law, that the plaintiff at the time of the accident involved in this case was a special employee of the defendant; that his injuries were therefore compensable under the provisions of the Labor Code (Workmen's Compensation Act) of this state [Labor Code, § 3201 et seq.], and that the Superior Court was without jurisdiction to hear or determine this case."

An annotated article appearing in 150 A.L.R. at page 1456, in considering the problem "whether a person in the military or naval service, including the state militia, is entitled to workmen's compensation," cites but one case dealing with the propounded question which it is therein stated, was revealed as the result of "a diligent search," to-wit: Rector v. Cherry Valley Timber Co., 1921, 115 Wash. 31, 196 P. 653, 13 A.L.R. 1247, which is also cited by appellant in support of a reversal of the instant judgment. That case held that a soldier delegated by the government to assist in procuring lumber for governmental purposes in a logging camp was a workman within the provisions of the Workmen's Compensation Act and entitled to compensation for injuries, and therefore he could not maintain an action against the owner of the camp to recover damages for the injury. In the course of its opinion, the court stated (115 Wash. at page 654, 196 P. at page 654, 13 A.L.R. 1247): "* * * the soldier by the voluntary act of joining the army * * * agreed to comply with every lawful order of his superior officers, and when that order was to engage in work designed to assist in the prosecution of the war, as provided by act of Congress, his appearance was voluntary. In any event, the respondent comes under the definition of a 'workman' laid down by statute in relation to the compensation of workmen. * * * It was the intention of the Legislature to protect every one engaged in work in any of the extrahazardous industries of the state, whether he be soldier or civilian * * *."

The cited case may be distinguished from the facts presented by the instant cause in that the Washington decision was based upon a special act of Congress, specifically authorizing the change of status of the soldier plaintiff to that of a civilian employee of the lumber company. The salary received by such soldier was paid by the company pursuant to such special act of Congress which created an enforceable and valid contract by operation of law.

No evidence was offered herein to show that respondent received, or that he was intended to receive, any compensation for his assistance to appellant, nor that any consideration passed either to respondent or the Navy for such assistance. Respondent, as a member of the United States Navy, was under compulsion to obey the orders of his superior officers, but his obedience of the order given, to the effect that he should proceed to the dock and carry out the instructions there given by appellant, was not sufficient to create a contractual relationship between him and appellant for hire or for compensation.

Moreover, as stated in 1 Campbell on Workmen's Compensation, page 452, Sec. 513: "The Federal Government as the sovereign power is not subject to the compensation Acts of the various States. It is, however, subject to its own Acts."

In Goldstein v. State, 1939, 28 N.Y. 396, 24 N.E.2d 97, 98, 129 A.L.R. 905, the court in rejecting the claim that a member of the state militia was entitled to workmen's compensation, stated: "In determining whether particular persons or classes are covered it is necessary to consider the statute as a whole and the purpose embodied in its enactment. When so considered it seems to us to be apparent that it was never intended to cover militiamen while engaged in active service. There are many reasons which lead to that conclusion. Working men and women, employees of others, under our system of government are free men and women. They have the same standing, rights and privileges possessed by other members of our body politic. They may work or not according to their own free will. If engaged in work they may quit working at any time if they desire without liability therefor unless prevented by the terms of some express contract. They may organize labor unions for the purpose of improving their working conditions. They may engage in strikes against their employers to compel their employers to grant them certain rights or privileges which they deem themselves entitled to. * * * Upon the other hand, when a man becomes a member of the State militia he must, when in active service, surrender for the benefit of the State certain of the privileges enjoyed by workingmen who are employees. Under the Military Law * * * a member of the militia may be tried for various military offenses, for acts which are not illegal under any other law. He may be tried and punished by a military tribunal and if found guilty may be punished by fines and in certain cases by imprisonment. He is at all times subject to the commands of his superior officers. He cannot quit while in active service without consent of his superiors. * * * It seems clear that one who joins the State militia and is engaged in active service therein is in no sense an employee of the State. He is simply performing a duty which he owes to the sovereign State as a resident and citizen. It makes no difference whether he does that voluntarily in time of peace or in response to the call of the Governor in time of trouble."

In Hays v. Illinois Terminal Transp. Co., 1936, 363 Ill. 397, 2 N.E.2d 309, it was held that the relation between the state and a member of the National Guard, who had been assigned to active duty to suppress riots and was injured in returning to his home, was essentially different from the relation which obtained between master and servant, because military service was based on the duty which every citizen owed to the sovereign and differed from ordinary employment in that an enlisted man could not terminate his service at will.

The relationship between respondent and the United States Navy in no sense could be denominated an employment. Therefore, by carrying out the orders of his superior officer to assist in the production of a moving picture, respondent did not thereby become a "special employee" of appellant within the meaning of the workmen's compensation act.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

76 Cal.App.2d 748

FOX WOODSUM LUMBER CO., v. JANES et al.

Civ. 15317.

District Court of Appeal, Second District,

Division 1, California.

Nov. 8, 1946.

1. Process ⚷4

Where one of two defendants filed a cross-complaint that affected plaintiff, the other defendant, and two cross-defendants, no summons was required as to plaintiff and the other defendant, but summons was required to be issued and served on the cross-defendants. Code Civ.Proc. § 442.

2. Dismissal and nonsuit ⚷57

Since statute, under which court loses jurisdiction where summons is not returned within three years, does not apply to the issuance, service, and return of summons on a cross-complaint, trial court had jurisdiction to dismiss cross-complaint because of failure of service of process on cross-defendants about 4½ months after filing of cross-complaint. Code Civ.Proc. §§ 442, 581a.

3. Dismissal and nonsuit ⚷60(1)

No fixed rule can be laid down for the exercise of discretion in dismissing a cross-complaint for want of prosecution, since such action is not regulated by statute, but the discretion to be exercised is a legal discretion, and must be exercised in such manner as to subserve and not to defeat the ends of substantial justice.

4. Dismissal and nonsuit ⚷60(3)

Dismissing cross-complaint for want of prosecution about 4½ months after it was filed was an abuse of discretion, where professional process server had been diligently but unsuccessfully attempting to find cross-defendants. Code Civ.Proc. § 442.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Fox Woodsum Lumber Company, a corporation, against Osmonde W. Janes and J. W. Dimmitt to recover on a check, wherein Osmonde W. Janes filed a cross-complaint for damages against J. W. Dimmitt and his copartners. From an order dismissing the cross-complaint on ground of want of prosecution, Osmonde W. Janes appeals.

Order reversed, and cause remanded.

A. J. O'Connor and George J. Hider, both of Los Angeles, for appellant.

No appearance for respondent.

WHITE, Justice.

No brief having been filed in behalf of respondent, this cause was ordered submitted pursuant to the provisions of rule 17 (b) of the Rules on Appeal, which rule further provides that in such cases the court may accept as true the statement of facts in the appellant's opening brief.

The following facts appear therein:

By this action filed May 16, 1945, plaintiff seeks to recover on a check in the amount of $4,300 which was executed and delivered by defendant Janes to defendant J. W. Dimmitt, the latter indorsing and delivering the document to plaintiff. Upon presentation thereof to the drawee bank it was dishonored because payment thereon had been stopped by the maker before presentation.

Defendant Dimmitt in his answer filed June 8, 1945, admitted the execution and delivery to him of said check and his subsequent indorsement, but denied any notice of dishonor.

Defendant and appellant Janes in his answer filed June 9, 1945, in addition to denying generally the allegations of the complaint, affirmatively pleaded (1) a conditional delivery of said check to the payee procured by his fraudulent representations, the payee's breach of said conditions and knowledge of all said facts by plaintiff-indorsee prior to indorsement; (2) want of consideration of said indorsement; (3) failure of consideration passing from payee to maker and a knowledge thereof by indorsee prior to indorsement; and (4) breach by indorsee of his agreement which was a consideration for the indorsement.

In addition to his answer, defendant Janes contemporaneously therewith, on

June 9, 1945, filed a cross-complaint for damages against defendant Dimmitt and his copartners individually, and as copartners doing business under the name of Utility Products, wherein it was alleged that the cross-defendants conspired, with the full knowledge of the plaintiff Fox Woodsum Lumber Company, to procure a conditional delivery of said check from defendant Janes by making certain fraudulent representations in order to liquidate a debt due from the said copartnership to plaintiff lumber company, and that the latter took said check by indorsement with full knowledge and notice of said fraudulent representations and conditional delivery.

On June 14, 1945, plaintiff lumber company answered said cross-complaint, denying generally the allegations thereof, and set up by way of affirmative defense substantially the allegations contained in its complaint.

Copies of the summons and cross-complaint were placed in the hands of a professional process server named Fred Ullrich, to serve the same upon Charles H. Harter and John J. Willinger, two of the cross-defendants and members of the above-named copartnership, and a copy of said summons and cross-complaint were sent by mail to Mark Jones, Esq., attorney for defendant Dimmitt.

On July 25, 1945, plaintiff lumber company filed its memorandum setting the cause for trial on September 18, 1945, up to which time the process server had not as yet made service of summons and cross-complaint on the aforesaid two cross-defendants. When the cause was called to trial on September 18, it was permitted to go off calendar because the matter was not then at issue.

On October 12, 1945, plaintiff served upon defendant Janes notice of motion to dismiss said cross-complaint on the ground of want of prosecution, since said process server had not made service of process on the above-mentioned two cross-defendants. This motion came on for hearing on the 26th day of October, 1945, and was by the court granted. From such order defendant Janes prosecutes this appeal.

It is the contention of appellant that the court was without jurisdiction to dismiss the cross-complaint for want of prosecution on the basis of the facts here present, and that said dismissal was in contravention of the provisions of section 581a of the Code of Civil Procedure.

[1] Section 442 of the Code of Civil Procedure provides that whenever a party seeks affirmative relief by way of a cross-complaint, such pleading must be served upon the parties affected thereby, and if any of the parties so affected have not appeared in the action, a summons on the cross-complaint must be issued and served upon them in the same manner as upon the commencement of an original action. In the instant case, therefore, no summons was required as to plaintiff lumber company and defendant J. W. Dimmitt who had theretofore appeared in the action, but a summons was required to be issued and served upon cross-defendants Charles H. Harter and John J. Willinger, who had not theretofore appeared.

[2] Section 581a, relied upon by appellant, does not apply to the issuance, service and return of summons upon a cross-complaint because the section was enacted before the law required summons in such cases. Seaman v. Superior Court of Marin County, 183 Cal. 47, 48, 190 P. 441.

Since section 581a is not applicable to the issuance, service and return of summons upon a cross-complaint, it manifestly follows that it is within the sound discretion of a trial court in the exercise of its inherent power, to dismiss a cross-complaint for want of prosecution. Therefore, appellant's contention that the trial court was without jurisdiction to dismiss is without merit.

The question presented is whether the trial court abused its discretion in making the order complained of. As heretofore noted, appellant filed his cross-complaint June 19, 1945; plaintiff's motion to dismiss the same was granted October 26, 1945. Some four months only elapsed between the date of filing and the date of dismissal of the cross-complaint.

At the hearing of the motion to dismiss, appellant's attorney presented his affidavit, from which it appears that, prior to the date of September 18, 1945, when the cause was called for trial and ordered off calendar, appellant's attorney had placed in the hands of a professional process server the cross-complaint and summons issued thereon for service upon the two cross-defendants who had not theretofore appeared in the action. Service of the cross-complaint was had upon plaintiff lumber company and defendant Dimmitt who had appeared in the action and plaintiff lumber company filed its answer to the same.

[3] No definite or fixed rule can be laid down for the exercise of discretion in dismissing a cross-complaint for want of prosecution since such action is not regulated by statute, but the discretion to be exercised, under the circumstances of the particular case, is a legal discretion, to be exercised in conformity with the spirit of the law and in such a manner as to subserve and not to impede or defeat the ends of substantial justice.

[4] In the instant case, if we assume that in the affidavit accompanying the motion to dismiss, a prima facie case of lack of diligence was shown, we are impressed that appellant met the burden cast upon him to show circumstances excusing his claimed tardiness in pursuing the two cross-defendants. Four months does not appear to us to be an unseemly or unreasonable delay when appellant had placed the summons with a process server who, in conjunction with plaintiff's attorney, were, according to the latter's affidavit, diligently attempting to locate the two cross-defendants. "Each particular case presents its own peculiar features, and no ironclad rule can justly be devised applicable alike to all." First National Bank of San Diego v. Nason, 115 Cal. 626, 47 P. 595, 596.

To us it appears that the delay was reasonably accounted for and excused, and that the order of the court did not tend to subserve the ends of substantial justice.

Persuaded as we are that the discretion of the court was improperly exercised, the order appealed from is reversed and the cause remanded.

YORK, P. J., and DORAN, J., concur.

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76 Cal.App.2d 662

SMITH v. BOARD OF EDUCATION OF LOS ANGELES CITY JUNIOR COLLEGE DIST. et al.

Civ. 15283.

District Court of Appeal, Second District, Division 3, California.

Oct. 30, 1946.

Hearing Denied Dec. 23, 1946.

1. Mandamus 🔑168(4)

Evidence justified conclusion that dismissal of teachers in Los Angeles City Junior College District was justified by decrease in number of students because of the war. Education Code, § 13651.

2. Appeal and error 🔑173(10), 846(6), 1078(1)

The appellate court would not adopt laches as a reason for affirming judgment notwithstanding sufficiency of such reason where point was not raised at trial, was not covered by court's findings or conclusions, and was not mentioned in briefs.

3. Schools and school districts 🔑141(1)

A teacher for junior college district who had taught for two years in junior college while it was operated by high school district was not entitled to credit for such two years in determining his seniority status on theory that he was governed by statute relating to classification of teachers, where statute was inapplicable because teacher's classification had not been affected, and employment by high school district would be recognized under statute only if it was necessary to do so in order to prevent disturbance of classification. Education Code, § 13093.

4. Schools and school districts ⚷141(1)

A teacher for junior college district was not entitled to credit for two years he had taught in junior college while it was operated by high school district on theory that the two districts should be regarded as single district and that date when he commenced teaching in junior college should be taken as date of his employment by junior college district, since each school district is a separate legal entity. Education Code, §§ 13651, 13652.

5. Constitutional law ⚷72

Courts cannot exercise supervision over other departments of government in matters of administrative detail.

6. Schools and school districts ⚷141(1)

Where teachers at time they were employed by junior college district had no seniority status, decision of board that teachers' seniority was in order in which their names appeared on alphabetical list was not in disregard of any right that teachers had to be employed in some different order, and hence teacher who was subsequently dismissed because of decrease in number of students was not entitled to reinstatement on ground that his seniority should have been determined by some other method. Education Code, §§ 13651, 13652.

◆

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Mandamus proceeding by Clinton Sheridan Smith against the Board of Education of Los Angeles City Junior College District and others to require plaintiff's reinstatement as a permanent classroom teacher in the Los Angeles City Junior College District. From an adverse judgment, plaintiff appeals.

Affirmed.

David Sokol, of Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, both of Los Angeles, for respondents.

SHINN, Justice.

This is a proceeding in mandamus to require the Board of Education of Los Angeles City Junior College District to reinstate plaintiff in his position as a permanent classroom teacher in the Los Angeles City Junior College District, as of the date when he was dismissed, June 30, 1944, and to pay him his salary as such teacher from the 1st day of September, 1944, until he is re-employed in his former position. Judgment was for defendants and plaintiff has appealed.

Plaintiff was employed as a probationary teacher by the Board of Education of the Los Angeles City High School District in the year 1924, and thereafter taught as a classroom teacher in the San Fernando High School until June, 1928; he was certified in 1926 as a permanent teacher for the High School District, was on leave of absence for a year prior to September 1, 1929, and thereafter was assigned to and taught in the Los Angeles City Junior College, then operated by the High School District, for a period of two years, as a permanent classroom teacher. In the year 1931 the Los Angeles City Junior College District was established and the district board on August 20, 1931, adopted a resolution electing and assigning to the Los Angeles City Junior College, effective as of August 31, 1931, 132 members of the faculty of said institution. Plaintiff was one of the associates elected to the said faculty; he taught for a period of three consecutive years and on or about August 24, 1934, was certified as a permanent classroom teacher in the Los Angeles City Junior College District, continuing to teach therein until June 30, 1944.

The court found that during the school year 1943–1944, the enrollment in said Los Angeles City Junior College District decreased to such an extent that it became and was necessary for defendant board to dismiss approximately 74 permanent teachers, and they were dismissed, effective as of June 30, 1944, plaintiff being one of those so dismissed. The findings set forth the average daily attendance of pupils each school month of the year 1943–1944. The total fell from 2561 on September 1, 1943, to 1897 on June 10, 1944. In the following school year the total attendance ranged from 2448 on September 1, 1944, to 2240 on May 9, 1945. In the year 1943–44, the number rose to as high as 2959, due to attendance of members of the United States Army under special contract with the Army, which was canceled in March, 1944, after which none enrolled in the special training program remained as students.

Plaintiff's attack upon his dismissal is twofold: first, that he was improperly dismissed when the teaching force was reduced, for the reason that the force was unnecessarily reduced, and, second, that if the reduction was necessary, he was included among those dismissed in disregard of his seniority rights. He claims a higher seniority rating than the board had given him.

[1] Section 13651 of the Education Code authorizes a decrease in the number of permanent employees when the same is made necessary by a decrease in the number of pupils. The court concluded that the dismissal of teachers was justified by the decrease in the number of students. This conclusion has full support in the findings and the evidence.

The next question concerns plaintiff's seniority rating. This was an important fact for the trial court to determine, for the reason that section 13651, supra, provides: "In making dismissals employees shall be dismissed in the inverse of the order in which they were employed," etc., and section 13652 provides that if the number of teachers be increased or the service re-established within one year from the time of dismissal, the dismissed employees shall have the preferred right of reappointment in the order of their original employment. On August 20, 1931, when 132 instructors were employed and assigned in a group to teach in the Los Angeles City Junior College District, they were listed alphabetically and seniority numbers were assigned in the order in which the names were listed, that is to say, in alphabetical order. Plaintiff's seniority position was No. 120 on the list. During the trial the parties entered into, signed and filed a stipulation of facts, attached to which, marked "Exhibit A," was a copy of the 1931 list. The stipulation read, in part: "That on August 20, 1931, the then acting Board of Education of the City of Los Angeles, as the governing board of the Los Angeles City Junior College District, elected and assigned to the Los Angeles Junior College District, effective as of August 31, 1931, 132 members of the faculty of said institution; that attached hereto, marked 'Exhibit A,' is a list of the names, positions and seniority numbers of said members of the faculty," etc. In May, 1944, the 1931 list and the minutes of the board were resorted to as a means of ascertaining the order in which the instructors had been employed. In May, 1944, the instructors were listed according to the order in which they had been employed, that is to say, in accordance with their relative seniority positions, and plaintiff was given the number 120 which had been assigned to him originally. The board did not make any changes in the relative seniority positions as they had been determined in 1931. Plaintiff's number, 120, brought him within the 74 instructors who were dismissed in the inverse order in which they had been employed. He was given that same position in the matter of a preferred right to reappointment when his number should be reached.

Plaintiff's claimed grievance is not that his seniority rights were disregarded at the time of his dismissal; it is that he should have been given a more favorable position of seniority when the board in 1931 determined the order in which the 132 instructors were employed.

[2] Before we proceed to a discussion of the grounds of plaintiff's claim, we should point out that plaintiff waited for 13 years before raising any question as to the correctness of the assignments of seniority that were made in 1931. As will appear hereinafter, he is asking the court to advance him to a position on the seniority list ahead of other instructors, although he does not point out where he claims to belong on the list, or he would have the court issue its mandate requiring the board to annul the action taken in 1931 and proceed to assign seniority positions to the 132 instructors by some method other than the one that was used at the time. He cannot, of course, be given a more favorable position except at the expense of those who now stand higher on the list than he does.

It is far too late for him to complain of seniority ratings which have been respected for 13 years. He has slept on his rights, if any, and is guilty of laches. Hayman v. City of Los Angeles, 17 Cal.App.2d 674, 62 P.2d 1047; Newbury v. Civil Service Commission, 42 Cal.App.2d 258, 108 P.2d 745. This would be a sufficient reason for affirming the judgment, but we do not adopt it, for the reason that the point was not raised at the trial, was not covered by the court's findings or conclusions, and is not mentioned in the briefs of counsel. We therefore proceed to a discussion of the claims advanced by plaintiff with reference to his claimed seniority rights.

[3] His first contention is that he should have been given credit for the two years he taught in the Junior College, 1929–1931, while it was operated by the High School District. It appears to be conceded that if this had been done, he would have received a seniority rating which would have placed him above the 74 instructors who were dismissed. His first argument is that section 13093 of the Education Code applies to his case and sustains his position. The section reads as follows: "The division, uniting, unionization, unification, or consolidation of any school district or districts, or any change in school district boundaries or organization, shall not affect the classification of certificated employees already employed by any school district affected. Such employees shall have the same status with respect to their classification by the district, including time served as probationary employees of the district after the division, uniting, unionization, unification, or consolidation, or change in school district boundaries or organization as they had prior thereto. * * *." Plaintiff argues that his "classification" was affected by the action of the board in ignoring his two years of service for the High School District which preceded the organization of the Junior College District, contrary to the provisions of the section. Defendant answers that the section in question is in Article III of Chapter 8, Division 7, of the Education Code, which chapter is entitled, "Employment of Persons Requiring Certification," Article III being entitled, "Classification of Employees," that it relates to classification and not to seniority and that no question of plaintiff's classification is involved. The trial court deemed section 13093 to be inapplicable, and we are of the same opinion. Employees are classified by the Education Code as probationary (sec. 13101), substitute (sec. 13103), temporary (sec. 13104), and permanent (sec. 13081 et seq.). Plaintiff's classification has not been affected. His seniority rights are another matter, to which section 13093 has no relation. It is immaterial whether the organization of the Junior College District amounted to a change in the organization of the High School District within the meaning of said section, for if it did, the result would be that, while the section would give protection to employees so far as classification is concerned, it would not give protection to claimed rights of seniority. The date of the original employment by the High School District would be recognized, under section 13093, only if it was necessary to do so in order to prevent a disturbance of classification, a situation which does not exist in plaintiff's case.

[4] Plaintiff further insists that if section 13093 does not apply to his case, the two districts should be regarded as a single district, and that the date when he commenced teaching in the Junior College for the High School District should therefore have been taken as the date of his employment by the Junior College District. We cannot agree that the two districts can be regarded as identical. It is well established, as stated by defendants, that "each school district is a separate legal entity and that the employees of one are not employees of another district, even though the governing boards of both districts are composed of the identical personnel." Gould v. Santa Ana High School Dist., 131 Cal. App. 345, 21 P.2d 623; McKee v. Edgar, 137 Cal.App. 462, 30 P.2d 999; Brightman v. Board of Education, 4 Cal.App.2d 394, 41 P.2d 346. In each of these cases it was held that employment by one district could not be deemed a part of the term of the employment by another district. Plaintiff seeks to avoid the application of this holding by pointing out that the cases dealt with employment by separate districts which were coexistent, whereas here the Junior

College District did not come into existence until plaintiff's services for the High School District had been terminated. This, in our opinion, does not distinguish the cases in principle. It is true that the Los Angeles City High School District and the Los Angeles City Junior College District are coterminous and governed by boards with identical membership, as allowed by section 4101 of the Education Code, but the fact that separate districts are authorized under these circumstances is evidence of the intention of the legislature that each should exist and function as a separate entity. If employment by a High School District must be considered as employment by a Junior College District under such facts as we have here, it would have to be by reason of some provision of the Education Code, and there is no such provision.

[5, 6] Plaintiff argues further that the relative seniority standings of the 132 members of the faculty employed August 31, 1931, if not determined on the basis of former employment by other districts, should have been decided by lot or by the relative efficiency rating of the members of the group, and that the use of the alphabetical listing was unreasonable, unfair and discriminatory. The trial court found nothing unfair in the procedure and we agree with that conclusion. The 132 teachers, at the time they were employed, had no seniority rights. The board was free to adopt any convenient method for determining the order in which they were employed. But if we were of the opinion that some other method would have been more suitable, we would still have to respect the board's interpretation of its duty in the premises. It is not the function of courts to exercise supervision over other departments of government in matters of administrative detail. The decision of the board that the employment of the instructors was in the order in which their names appeared on the alphabetical list was not in disregard of any right which plaintiff or the others had to be employed in some different order.

The judgment is affirmed.

DESMOND, P. J., and WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.

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76 Cal.App.2d 651

PEOPLE v. CHAPMAN.

Cr. 3990.

District Court of Appeal, Second District, Division 1, California.

Oct. 30, 1946.

1. Criminal law ⚷1023(13)

Where no motion for a new trial was made, an appeal from order denying a new trial must be dismissed.

2. Homicide ⚷250

Evidence sustained conviction of manslaughter.

3. Homicide ⚷116(4)

The apprehension of danger to life or limb that justifies a man in taking the life of another must be well grounded and arise out of a reasonable cause. Pen.Code, §§ 197, 198.

4. Homicide ⚷300(9)

Where evidence showed that defendant shot deceased without warning when he was directly in front of her and at a time when deceased was unarmed except for a pair of pliers, and that defendant shot a second time when deceased was running away, court properly refused to charge that a person in the exercise of his right of self-defense may not only stand his ground and defend himself when attacked, but pursue his adversary until he has secured himself from danger. Pen.Code, §§ 197, 198.

5. Criminal law ⚷829(5)

In prosecution for murder, charge that a person assailed may repel force with force and may defend himself from apprehended dangers to any extent which is apparently necessary by reasonable means, and that, if jury found that deceased's conduct was such as to induce in the mind of a reasonable person the fear that great bodily harm or injury was imminent, defendant had a right to defend herself from such apprehended danger to the extent that was apparently necessary by reasonable means, was a correct statement of the rule of appearances and positively advised jury on a question as to which it has been negatively instructed and justified the refusal of further instructions on doctrine of appearances. Pen.Code, §§ 197, 198.

6. Homicide ⚷340(2)

Where defendant was charged with murder and the defense of justification was a question for jury, instruction defining manslaughter in the language of the Penal Code was not prejudicial error. Pen.Code, § 192.

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Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Julia Chapman was convicted of manslaughter, and, from such conviction and an order denying a new trial, she appeals.

Appeal from order denying new trial dismissed, and judgment affirmed.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

[1] Defendant was charged in an information filed by the District Attorney of Los Angeles County with the crime of murder. She entered a plea of not guilty and the jury found her "guilty of manslaughter, a felony, a lesser offense necessarily included in the charge set forth in the information." This appeal is prosecuted from the judgment of conviction and "from the order denying the motion for a new trial." Since no motion for a new trial was made, the appeal from the order denying a new trial must be dismissed.

Appellant here urges (1) that the evidence is insufficient to support the judgment of conviction; and (2) that the trial court committed prejudicial error in the giving and the refusal of instructions.

In connection with her first point, appellant points out that having admitted the shooting, "the question of guilt depended upon the claim of justification or self-defense. There was nothing inherently improbable in defendant's account of the shooting and it cannot be said from a reading of the record that the jury could not have reconciled all of the established circumstances with the theory of defendant's innocence."

From the record herein it appears that appellant and David Austin Tipton, the decedent, met and lived together illicitly in Texas; that in 1937 appellant moved to California, ostensibly to get away from deceased, but he followed her in a couple of months and they continued to live together. On the afternoon of July 27, 1945, deceased, who had been drinking, quarreled with appellant at her home because she would not give him some liquor, and he started fighting her and cursing her. Appellant operated a hot dog stand at night at 41st and Central Avenue, and on the evening of July 27, between 10 and 10:30, a Mr. McClain and a Mr. Garcia stopped at the stand for something to eat and drink, at which time they saw appellant and deceased at the stand, the latter apparently intoxicated; that appellant was inside the stand, deceased standing on the outside saying "Serve the whiskey over the bar"; and at the same time cursing and gesturing at appellant, who told him to leave and stop running her customers away. Deceased tried to enter the stand but without success. No weapons were observed in the hand of either appellant or deceased at this time, and because of the quarreling, Messrs. McClain and Garcia left.

At approximately 11:00 that same evening, special police officer Burvender was walking near appellant's stand when he heard a sound like the discharge of a firearm, saw a crowd of people gathering near the hot dog stand and proceeded in that direction when he heard a second shot, saw the flash of a gun near the stand, went around in back thereof with another officer and found the deceased in a half reclining position on the ground. About 10:50 p. m. on the night in question, one Gaski, a Los Angeles police officer, was cruising in a police car near the intersection of 41st and Central when he heard a report that sounded like the discharge of a firearm. He glanced toward the hot dog stand and saw appellant and deceased. He testified that he saw appellant leaning out of the service window of the hot dog stand with her arm protruding and a gun in her hand; and "I saw a man later identified as the deceased Tipton, running away from the lunch stand. * * * I saw fire emerging from the pistol held by the defendant and the report of a gunshot about the same time that the deceased, Tipton, spun around and changed his direction and ran west to the service station lot where this lunch room is situated, to the rear of the service station." That the second shot was fired at deceased when he was less than 20 feet from the appellant; that the witness Gaski "immediately made a U turn and drove in the service station grounds, got out of the police car and went to the lunch stand and the door was open and I put my hand out and Mrs. Chapman handed me a pistol;" a Colt .32 automatic pistol, with five shells in the clip and one in the barrel. Said officer asked appellant "what had happened and who was she shooting at. * * * The defendant told me that it was her common law husband, that she had been having trouble with him for the past two years, he had been abusing her and had threatened to kill her and on this particular night he was bothering and molesting her again and she wasn't feeling well, so she shot him." Said witness then went to the rear of the service station to see deceased, who was kneeling and leaning against the building, with a wound in the left side of his neck.

The autopsy surgeon testified that death was due to internal hemorrhage due to gunshot wound of the neck and that the bullet which struck deceased was recovered in his body at the autopsy.

Mr. Dimon, a police officer of the City of Los Angeles, who took Mr. Tipton and appellant to the Georgia Street Receiving Hospital, and talked to both of them at that time, testified that before he died, Mr. Tipton, in answer to the officer's questions, stated that appellant shot him; that he had no weapon in his possession at the time of the shooting and had not put appellant's life in danger. When the officer suggested that Mr. Tipton be searched for weapons, appellant stated: "Oh, there is no use, he didn't have anything anyway." Search of decedent revealed that he had a pair of pliers in his hip pocket at which time appellant volunteered the information to the officers that deceased had the pliers to fix the wiring of the hot dog stand. Thereafter on the way to the police station, this witness had a conversation with appellant to the following effect: "I asked her where she had obtained the gun and she said that it was left at her place by some sailor who stayed there, who wasn't able to pay her and I asked her how long she had had it, and I don't recall now just how long she did say but—then I asked her if she had been in the habit of carrying it from the house down there to the place of business and she said, 'No,' she said that she kept it locked up in her closet at home with some liquor and other stuff that she had and that was the first time that she had ever brought it to the place of business, that she had anticipated trouble with Tipton that night because he had stayed home from work and was drinking and when he started drinking that he got mean and she also stated that some time prior to this incident that he had threatened her life with a butcher knife."

In a typewritten statement in the form of questions and answers made to Sergeant R. H. Howsley of the Los Angeles Police Department, appellant stated that about 2:00 p. m. of July 27, 1945, she and deceased had an argument at her home at which time decedent "tussled and hit me beside the head with his fists. * * * I asked him why he didn't go and leave me alone. He said if I gave him the stand and $100.00 he would go. * * * He said he didn't want to stay there." That around 7:00 she and deceased went to the hot dog stand together in another man's car; that she opened the stand and deceased left for a haircut returning about 9:00 p. m. when he started arguing with her and calling her names; that he pulled a pair of pliers out of his pocket and cut off the lights to the stand; that he made grabs at her and cursed her and then went across the street; that a boy named Arthur Davis, came to the stand and fixed the lights, whereupon deceased returned and cut them off again; that she then told Davis to go across the street and telephone "for this man to come and pick me up, that we wasn't going to stay open any more. That's when he (deceased) started arguing again and cursing.

That's the time he grabbed me and I jumped back. Then he goes around to the back door and told me to open it. He comes back to the front and said, 'I'm going to fix you up', get even with me. He goes back to the storeroom. I peeked out the door and saw him unlock the door and that's when I reached up and got my purse and put the gun on the little shelf. When he walked up, cursing me, that's when I shot him. * * * I went out and closed the door. * * * When I shot him, he ran around the station. * * * I don't think I had fired but once, but they said twice." In answer to the question: "When you took this gun from the closet on the afternoon of July 27, 1945, and put it in your purse, did you think at that time that you were going to have trouble with Tipton?" appellant stated: "I thought I would. When he lays off, I always have trouble with him"; that this was the first time she had carried the gun to the hot dog stand.

"Q. Did Tipton strike you with any object of any kind there at the hot dog stand? A. No. He had the pliers in his hand, but was going, I think. He still had them in his hand.

"Q. He didn't strike you? A. He just grabbed at me.

"Q. After you had taken the gun from the purse and laid it on the shelf, when did you pick the gun up in your hand? A. I had my hand on the gun when I saw him. I was sitting on a stool and I saw him coming from the direction of the storeroom. I had my hand on it, was a rag covering it.

"Q. When he approached, you picked the gun and put it in your hand? A. I had an idea and as he passed the window —it was on the side—I had the gun in my hand.

"Q. What did he do when he came up? A. He said, 'You dirty bitch if you think you are going to get rid of me.'

"Q. What did he do? A. That's all he said and I let him have it. He came right up close.

"Q. But you didn't see him make a grab at you? A. No. I said, 'I have told you to let me alone.' * * * I stood up. He was right up against the counter and I raised up and fired."

Appellant took the stand in her own defense and testified, among other things, that she was afraid of decedent; that in January of 1945 he hit her over the left eye with an unopened knife, the wound requiring two or three stitches to close; that in March of that year he was fighting her and she started to run to her aunt's home; that he caught her before she reached that place, hit her and knocked her down, a ring on his finger cutting her on the head between the eyes; that in April he came home drunk when appellant was entertaining friends, started arguing, followed her into the bedroom, threw her on the bed and hit her "about seven or eight times and my eyes were all black, it knocked my tooth through my lip"; following this, appellant's friend Mrs. Griffith stayed with her about a week because she had to stay in bed; that a week or so prior to the shooting, decedent was drunk and was running around the house with a butcher knife and that she got away and ran to her neighbor Burnett's home.

Appellant testified that on the night of the shooting, deceased threatened to kill her; that he struck at her, "Oh, I guess five or six times. * * * He had the pliers in his hand." That he was striking hard but missed her because she would jump back; that "as he went around to the storeroom he said he was going to kill me, and I got the gun then." Appellant stated that during the time decedent was striking at her with the pliers she shot him; she thought she shot him once but didn't remember shooting him twice; that he was not running away from the stand when she shot him, but was striking at her. She also testified on cross-examination, that during the period of decedent's abusive treatment of her, she never complained to the police department or other public official, although on one occasion when he was chasing her with a butcher knife she started for the Newton Street Station, but returned home with decedent on his promise not to fight with her; that on the night of the shooting, she decided to go home after he threatened to kill her but did not ask Arthur Davis to call the police; that she did not consider it serious enough to take it up with the authorities.

[2] It is obvious from the foregoing resume that the evidence was amply sufficient to support the jury's verdict of manslaughter and the resulting judgment. Appellant had plenty of opportunity on the day of the shooting to make a complaint against decedent, but instead she took the gun from her house to the hot dog stand in anticipation of trouble, and when decedent verbally abused her and physically threatened her armed, if at all, with a pair of pliers, she took the law into her own hands. The circumstances under which the shooting occurred, i. e., the comparatively safe position of appellant in that the only weapon at decedent's disposal was the pair of pliers, the fact that appellant gave him no warning of her purpose but fired twice, once while he was running away from her —all negative the claim of self-defense or justification.

[3] As stated in People v. Holt, 25 Cal.2d 59, 65, 153 P.2d 21, 25: "The basic law of self-defense is set forth in sections 197 and 198 of our Penal Code. So far as pertinent here section 197 provides that 'Homicide is * * * justifiable when committed by any person in either of the following cases: * * *

"'3. When committed in the lawful defense of such person * * *, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person * * * if he was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed * * *.'

"Section 198 reads as follows: 'A bare fear of the commission of any of the offenses mentioned in subdivisions two and three of the preceding section, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone.'

"The pertinent principles governing the right of self-defense are explained in People v. Westlake, 1882, 62 Cal. 303, 307: 'The apprehension of danger to life or limb which justifies a man for taking the life of another must be an honest one—one that is well grounded, and must arise out of a reasonable cause; * * *.'"

In People v. Jackson, 74 Cal.App.2d 22, 167 P.2d 776, 777, the appellant contended, after admitting the killing, that it was done in self-defense, and that the evidence was insufficient to sustain the verdict, as it is here contended, the court said:

"We find no merit in defendant's first contention. Her sole defense to the admitted killing was that of self-defense. The argument which her counsel has addressed to us upon this issue concerns the threats made upon the life of defendant by her husband, his general demeanor on the day of the shooting and his actions immediately prior thereto, matters which were all presented to the jury. It is not the province of this court to weigh the evidence. That is the function of the jury in the first instance and of the trial court after the jury has concluded its deliberations and a verdict has been reached. Where, as in the present case, the jury has found against the defendant and the trial court has denied a motion for a new trial, such conclusions will not be set aside on appeal on the ground of insufficiency of the evidence where it is not made to clearly appear 'that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below.' (People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780)."

Appellant claims the court erred in refusing to give the following instruction requested by her, particularly that portion thereof pertaining to the right of pursuit:

"A person in the exercise of his right of self defense not only has a right to stand his ground and defend himself when attacked but he may pursue his adversary until he has secured himself from danger."

[4] In making this contention, appellant cites People v. Orosco, 73 Cal.App. 580, 239 P. 82; People v. Carson, 43 Cal.

App.2d 40, 110 P.2d 98; People v. Kinowaki, 39 Cal.App.2d 376, 103 P.2d 203, and People v. Hatchett, 56 Cal.App.2d 20, 132 P.2d 51, in support thereof. An examination of those cases, however, leads to the conclusion that while it may be error to refuse or to fail to give such an instruction where the facts of the particular case reveal a theory or a factual situation wherein the right to pursue and slay is actually involved, no such situation exists in the present instance. Appellant shot deceased when he was directly in front of her, without warning and at a time when decedent was unarmed except for a pair of pliers. Moreover, she shot the second time when he was running away from her, hence the right to pursue and slay is not involved. In People v. Hatchett, supra, where the defendant testified that the decedent, while in an intoxicated condition, pointed a gun at her and threatened to shoot her, that she knocked the gun from his hand and a tussle ensued, and that she shot the decedent as he was coming toward her with a metal smoking stand, the court held that she was entitled to have the jury fully instructed on the law of self-defense, particularly with regard to her right to stand her ground and defend herself when attacked and to pursue her adversary until she had secured herself from danger.

In People v. Hecker, 109 Cal. 451, 463, 42 P. 307, 312, 30 L.R.A. 403, also cited by appellant, there was a shooting affray wherein both parties were shooting at each other with no apparent abandonment thereof on the part of either. There the court failed to give an instruction on the right of pursuit and on this and other grounds the conviction was reversed, it being there stated: "* * * so, too, under such circumstances, he may pursue and slay his adversary. But the pursuit must not be in revenge, not after the necessity for defense has ceased, but must be prosecuted in good faith, to the sole end of winning his safety and securing his life."

There was no evidence produced herein which would require an instruction on the right of pursuit, and although the trial court would not have gone astray in giving such an instruction, it was not legally required to do so, and no prejudicial error resulted from its refusal to so instruct the jury.

Appellant also urges that prejudicial error was committed by the refusal of the trial court to give the following instruction on the doctrine of appearances:

"You are instructed that the defendant was entitled to act upon the doctrine of appearances, and if the language and conduct of Mr. Tipton was such as to induce in the mind of a reasonable man, under all the circumstances then existing and viewed from the standpoint of the defendant, a belief that he was about to be attacked by Mr. Tipton, it does not matter if such danger was real or apparent; and if the defendant acted in self defense from real and honest convictions as to the character of the danger induced by the existence of reasonable circumstances he should be acquitted even though he was mistaken as to the extent of the danger. If the evidence produced in your minds a reasonable doubt as to whether or not the words and actions of Mr. Tipton constituted such an appearance as would cause a reasonable man in the defendant's position to believe that he was in danger of attack immediately then you should resolve that doubt in favor of the defendant and find her not guilty."

It is also contended by appellant that the court committed prejudicial and reversible error in the giving of the following instruction on the doctrine of appearances:

"A person may have a lively apprehension that he is in imminent danger, and believe that his apprehension is based on sufficient cause and supported by reasonable grounds; that such apprehension is reasonable and warranted from appearances as they present themselves to him. If, however, he acts on these appearances, he does so at his peril, because the law leaves it to no man to be the exclusive judge of the reasonableness of the appearances upon which he acts, but prescribes a standard of its own, which is not only did the person acting on the appearances himself believe that he was in deadly peril of his life or of receiving great bodily harm, but would a reasonable man, situated as the defendant was, seeing what he saw, and knowing what he knew, be justified in believing himself in danger."

Appellant urges that the court in People v. Hatchett, 63 Cal.App.2d 144, 158, 146 P.2d 469, 476, in considering an instruction identical to that last hereinabove quoted, stated "It is true that the four instructions given at the request of the People do not incorrectly state the law of self-defense, but they state the rule negatively and from the viewpoint solely of the prosecution. * * * The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. * * * There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles."

[5] In addition to the instruction of which appellant complains the court gave the following instruction, which was requested by appellant: "Under our law a person assailed has the right to repel force with force, and he may employ the right to defend himself from apprehended danger to any extent which to him is apparently necessary, acting in a reasonable manner. If you find from the evidence in this case that Mrs. Chapman's conduct in this case was such as to induce in the mind of a reasonable person the fear that she would be done great bodily harm or injury then I instruct you that the defendant had the right to defend herself from that apprehended danger to that extent which to her was apparently necessary, acting in a reasonable manner." This instruction is a correct statement of the rule of appearances, except that the name Mrs. Chapman should have been Mr. Tipton, and positively advised the jury on a question as to which it had been negatively instructed. It therefore became unnecessary for the court to give the refused instruction on the doctrine of appearances.

It is finally argued that the court committed prejudicial error in giving the following instruction:

"Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: 1. Voluntary—upon a sudden quarrel or heat of passion. 2. Involuntary—in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death in an unlawful manner, or without due caution and circumspection." People v. Hatchett, 63 Cal.App.2d 144, 159, 146 P.2d 469, is again cited in support of this point.

[6] The instruction complained of is a direct quotation of section 192 of the Penal Code. Moreover, appellant fails to complete the instruction, i. e., a lengthy explanation of the definition of manslaughter. The same question arose in the case of People v. Hashaway, 67 Cal.App.2d 554, 569, 155 P.2d 101, 108, 823. It was there stated: "Defendant asserts that the portion of the instruction relating to involuntary manslaughter should not have been given for the reason that 'when a person commits a homicide in necessary self-defense, he is not bound to use any due caution and circumspection when protecting himself.' That reason, so assigned by defendant, is based upon the assumption that at the time the instructions were given it was known that defendant acted in self-defense. It was a question of fact for the jury as to whether defendant acted in self-defense. At the time the instructions were given, the jury, of course, had not determined whether the defense of self-defense had been proved." Likewise, in the instant case, self-defense as a justification for the shooting was a question for the jury to determine, consequently the definition and explanation contained in the instruction objected to was not prejudicial to appellant's cause. It should not be overlooked that appellant here was charged with murder which included the lesser offense of manslaughter, and since as a matter of law both voluntary and involuntary manslaughter were involved therein, it could not be prejudicial error to give the instruction complained of.

For the reasons stated, the judgment appealed from is affirmed. The appeal from the order denying a new trial is dismissed.

DORAN and WHITE, JJ., concur.

76 Cal.App.2d 669

WATTON v. WATTON.

Civ. 15386.

District Court of Appeal, Second District, Division 3, California.

Oct. 30, 1946.

1. Husband and wife ⚷280

Where husband and wife entered into support agreement and thereafter husband obtained a foreign divorce decree which accepted and adopted the agreement, husband could not escape liability on ground that the agreement was merged in the divorce decree and that decree was void because the court was without jurisdiction to approve the agreement and to order him to pay the sums stipulated therein, since, if the decree was void, the contract could not be merged in the decree.

2. Divorce ⚷331

In action by former wife against former husband to recover on a support agreement which was incorporated in divorce decree for husband in Nevada, wherein there was no evidence tending to show what the law of Nevada was with reference to the incorporation in a divorce decree of a provision for support, the rule prevailing in California was controlling.

3. Divorce ⚷331

In action by former wife against former husband to recover on a support agreement which was incorporated in Nevada divorce decree for husband, the presumption was that Nevada court had jurisdiction to incorporate in divorce decree the provision for support, and burden was on husband to show the contrary. Code Civ. Proc. § 1963, subd. 16.

4. Divorce ⚷236

Court, in granting divorce to husband, had jurisdiction to incorporate therein the terms of a prior agreement between husband and wife whereby husband agreed to pay wife during the remainder of her life or until her remarriage 10 per cent. of his gross earnings and receipts from investments.

5. Divorce ⚷331

Husband who obtained a Nevada divorce from his wife by decree incorporating a previous support agreement between husband and wife was estopped to maintain, in wife's action against him in California to recover under the agreement, that the Nevada court was without jurisdiction to incorporate the agreement in its decree.

6. Courts ⚷9

One who enjoyed the rights and privileges of residence in California and the benefits of its laws could not claim immunity in suit against him in California by his former wife to recover on support agreement which was incorporated in Nevada divorce decree, because former wife at date of the agreement was a resident of Great Britain and that alleged statute of Great Britain prohibited the filing of any action anywhere for the purpose of enforcing a judgment or claim for money except by permission of the High Court of Justice.

7. Husband and wife ⚷279(2)

Failure of former wife to prosecute her claims for some 10 or 11 years on support agreement, which was incorporated in divorce decree, did not amount to an "abandonment" of her claims, since delay alone does not constitute abandonment.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandonment".

8. Husband and wife ⚷281

Where husband and wife entered into an agreement, which was subsequently incorporated in divorce decree, whereby husband agreed to pay wife during the remainder of her life, or until her remarriage, 10 per cent. of his gross earnings and receipts from investments with a minimum of one English pound sterling, or $4.02, a week and in answer filed by husband in wife's action on the agreement he admitted that he had earned $8,514.07, evidence sustained judgment for wife for $1,807.79.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Dorothy Mary Watton against Geoffrey Earl Watton, also known as Gerald Hamer, to recover on an agreement, which had been made part of a divorce decree, whereby defendant agreed to pay plaintiff during the remainder of her life, or until her remarriage, 10 per cent. of his gross earnings and receipts from investments. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

Milton M. Cohen, of Hollywood, and Jerome H. Kann, of Los Angeles, for appellant.

John Moore Robinson and Walter R. Powers, both of Los Angeles, for respondent.

SHINN, Justice.

Plaintiff and defendant herein were formerly wife and husband respectively. On July 12, 1933, they entered into an agreement, by the terms of which defendant agreed to pay plaintiff during the remainder of her life or until her remarriage, ten percent of his gross earnings and receipts from investments, with a minimum of one English pound sterling ($4.02) per week. Defendant brought suit for divorce in the State of Nevada and on September 5, 1933, a decree was granted in his favor, containing provisions accepting and adopting the agreement as a part of the decree, and ordering defendant to provide plaintiff herein with support as specified in the agreement. The present action was commenced August 7, 1944. The amended and supplemental complaint alleged the making of the agreement and the granting of the Nevada decree which ordered defendant to make payments in accordance with the agreement. It alleged that defendant had received as earnings specific sums of money between September 19, 1939, and September 5, 1944; that he had wholly failed to pay any sums as provided in the agreement and the decree, and that there was accrued and unpaid thereunder the sum of $1807.79, and it prayed for judgment in that amount. Findings and judgment were in accordance with the allegations of the amended and supplemental complaint. Defendant appeals.

[1] It is the contention of defendant that plaintiff was not entitled to recover on the agreement because it was merged in the Nevada decree, citing Hough v. Hough, 26 Cal.2d 605, 160 P.2d 15. He also contends that the Nevada court was without jurisdiction to approve the agreement and to order him to pay the sums stipulated therein, for the reason that the decree was in his favor and the court therefore could not order him to support plaintiff. Upon this proposition he cites In re Nielsen, 19 Cal.App.2d 305, 65 P.2d 360, and earlier cases which hold that the statutory law of California forbids the granting of support to an offending wife. Thus he reaches the conclusion that plaintiff can recover neither on the agreement nor the decree, and hence that she cannot recover at all. He cannot, of course, escape from both, since his obligations under the contract could not be merged in the provisions of a void decree. The judgment, however, was upon the decree and sustains the jurisdiction of the Nevada court.

[2-5] Upon the proposition that the Nevada court was without jurisdiction to incorporate the provision for support, defendant says: "Respondent, in the case at bar, as said before, did not present any proof to the effect that the Nevada Law gives the Court jurisdiction to award alimony to a guilty wife. There was no evidence at all tending to show what the law was in Nevada, and, in fact, the Nevada law was not mentioned by respondent at the trial of the cause. It follows that the rule prevailing in California on the subject is controlling. Wickersham v. Johnston, 104 Cal. 407, 38 P. 89, 43 Am.St.Rep. 118." The presumption is that the court had jurisdiction. Code of Civil Procedure, sec. 1963, subd. 16. The burden was upon appellant to show the contrary. Appellant states that he has been unable to find any reported decision of a Nevada court sustaining his contention, and he has not cited any statutory law of Nevada. The California cases, based upon our code provisions, have no application. In Morrow v. Morrow, 40 Cal.App.2d 474, 105 P.2d 129, the District Court of Appeal upheld the jurisdiction of the courts of Nevada, in awarding a husband a divorce, to direct

support money to be paid to the wife. The factual situation there did not differ in any material respect from our own, and the arguments against jurisdiction were the same as those advanced by defendant herein. The court, in a well-considered opinion prepared by Mr. Justice Ward, in sustaining the jurisdiction of Nevada courts to award support to an offending wife, based its holding upon the general jurisdiction conferred upon those courts by the laws of Nevada. It was held that such an award may be made independently of any agreement of the parties for such support. It is unnecessary to repeat what was said in reaching this conclusion. We are in full accord with that holding, and we are also in agreement with the further holding of the court that the principles of estoppel are available in defense of the decree and will operate to defeat attacks upon the jurisdiction of the court to award support. Estoppel is relied upon by the plaintiff in the present case, as it was in the Morrow case, and furnishes an independent defense to the attack upon the jurisdiction. It was said in that case 40 Cal.App.2d at page 485, 105 P.2d at page 135: "A husband and wife in a divorce proceeding agreeing to an amount to be paid by the husband as support and maintenance are estopped in a subsequent proceeding from denying the scope given by a decree upon the stipulation. Dickey v. Dickey, 154 Md. 675, 141 A. 387, 58 A.L.R. 634." See also Dean v. Dean, 136 Or. 694, 300 P. 1027, 86 A.L.R. 79; Bledsoe v. Seaman, 77 Kan. 679, 95 P. 575; 3 Freeman on Judgments, 5th Ed., p. 2963. Defendant's agreement, and the arrangement to have the terms of it carried into the decree, no doubt furnished inducement to plaintiff to allow defendant to procure a divorce by default. Having obtained the divorce, it would be most unfair, and a legal fraud upon plaintiff, for defendant to retain the advantage of the decree and to escape his obligation by denying the jurisdiction of the court to award plaintiff support.

[6] At the inception of the trial defendant offered an amendment to his answer, pleading an act of the Parliament of Great Britain of September, 1939, which he states, "prohibits the filing of any action anywhere for the purpose of enforcing a judgment or claim for money except by permission of the High Court of Justice," and alleging that plaintiff had not obtained such permission to bring the present action. He argues that it appears from the agreement of the parties that plaintiff was at the date of the agreement a *resident* of Great Britain and that she is therefore subject to the laws of that country. The text of the act is not before us, and, so far as we can determine, it was not before the trial court, although it is said that it may be found in Volume 32 of the Complete Statutes of England. The court denied permission to file the amendment and the ruling is assigned as error. We think plaintiff's right to sue in the California courts depends upon her compliance with the laws of this state. Defendant did not make proof of the English statute and we have not examined it. However, we do not see how he can expect to enjoy the rights and privileges of residence in California, and the benefits of our laws, and claim immunity from suit upon his obligations under the laws of Great Britain, if, indeed, they purport to furnish him immunity.

[7] Defendant did not plead that plaintiff had abandoned her rights under the judgment, but he argues that her failure to prosecute her claims for a period of some ten or eleven years amounted to an abandonment of the same. Delay, alone, does not constitute abandonment.

[8] Finally, defendant says that there is no basis in the evidence for the computation which resulted in the judgment for $1807.79, but he ignores the allegation of his answer that within the five years immediately preceding the commencement of the action, namely, October 2, 1944, he earned $8,514.07. The court found that plaintiff was entitled to recover $4.02 per week for 300 weeks, exclusive of those weeks for which she was entitled to receive ten percent of defendant's earnings, and defendant points out no error in this finding. It was further found that defendant had received on certain dates earnings in the total amount of $5,897.90, and this finding is not challenged by appellant. The judgment is in substantial agreement with

the findings, which, as we say, found defendant's earnings to have been less than the amount admitted in his answer. He is not aggrieved by the amount of the judgment.

The judgment is affirmed.

DESMOND, P. J., and WOOD, J., concur.

76 Cal.App.2d 724

ESTUS v. WEBER.

Civ. 3448.

District Court of Appeal, Fourth District, California.

Nov. 6, 1946.

1. Fixtures 🔑35(3)

Whether a building has been affixed to and has become a part of the property, is a question of fact. Civ.Code § 660.

2. Fixtures 🔑4

In determining whether a building has been affixed to and has become a part of real property, the intent of the parties is usually the controlling factor. Civ.Code, § 660.

3. Fixtures 🔑35(2)

Evidence that building was simply resting on a concrete slab and was not fastened to the land or to property and that sometime before the building was removed, the plumbing which had been inside was disconnected sustained finding that building was not a part of the real property and owner could remove the building from the premises. Civ.Code, § 660.

4. Evidence 471(19)

In action for damages for removal of a small building from land owned by plaintiff wherein main issue concerned whether building was a fixture, statement of owner of realty that building was "tied down" to the property by water, gas, lights, and sink and hot water heater, was but a conclusion.

5. Fixtures 🔑35(2)

In action for damages based on removal from plaintiff's land of small building which had been used seasonally for twelve years as a "hot dog" stand by others than plaintiff, evidence justified inference that plaintiff knew that the building was owned by others and that plaintiff waived any right to object to the fact that the building was not removed at an earlier time than it was.

Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

Action by Hugh A. Estus against George E. Weber for damages based on the removal of a small building from land owned by plaintiff. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Fred J. Dudley, of Costa Mesa, for appellant.

Head, Wellington & Jacobs, of Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an action for damages based on the removal of a small building from land owned by the plaintiff. The plaintiff purchased the land from the City of Newport Beach, his deed being dated January 2, 1945. It appears that the City of Newport Beach had acquired title to the land through a tax sale. Prior thereto, under some arrangement with the then owner, the building had been placed on this land, and for some twelve years it had been used, seasonally, as a "hot dog" stand. The purported ownership of the building, as distinguished from the land, had been transferred a number of times during these years and it was finally purchased by the defendant on May 1, 1945. The building was seven feet by twelve feet in size and was made of corrugated sheet iron. No wood was used in its construction and there is evidence that it was worth from $15 to $20. The defendant removed the building from this land on May 29, 1945, and this action followed.

So far as material here, the complaint alleged that the defendant unlawfully removed this building, and "that the building so removed was attached to and a part of the land within the meaning of section 660 of our Civil Code." The answer denied these allegations and alleged that the plaintiff had no right to, or interest in, the building. After a trial, the court found that this building was not a part of the real property owned by the plaintiff, and further found that the defendant was the owner thereof and that he had a right to remove it from the premises. Judgment was entered accordingly and the plaintiff has appealed.

The appellant contends that the evidence is insufficient to support the findings above mentioned. The controlling question is whether this building was attached or affixed to the land in such a manner as to become a part of the realty, it having been incumbent upon the appellant to establish that fact.

[1, 2] It is well settled that the question whether a building has been affixed to and has become a part of real property is one of fact and is one dependent upon the peculiar circumstances of each case. Alderman v. Baggett, 134 Cal.App. 501, 25 P.2d 532, 533. In that case it is said: "Among the things that should be taken into consideration in deciding such a question are the following: The character of the building and the manner of its construction; the presence or absence of customary methods of attaching to or embedding in the soil; the use to which the building is adapted and to which it has been put; and any expressed intent with regard to its permanence."

The intent of the parties is usually the controlling factor, and various matters may and should be taken into consideration for the purpose of ascertaining that intent. Gosliner v. Briones, 187 Cal. 557, 204 P. 19.

[3] Applying these rules here it must be held that the evidence, with the reasonable inferences therefrom, is sufficient to support the findings made. There is evidence that this building which was, in fact, but a sheet-iron shell, was simply resting on a concrete slab near the entrance to a bath house, "sitting on it like a sidewalk or entrance to a building"; that it was just sitting there and was not attached to the land by any bolts or anything at all; and that there was no fastening of the building to the property itself. Also, that sometime before the building was removed any plumbing which had been inside it had been disconnected.

[4] The appellant testified that he had been long familiar with this building; that it had been used as a "hot dog" stand for a good many years; that it was resting on a concrete floor; and that "the building was tied down to the property by water, gas, lights and sink and hot water heater." The statement that the building was thus "tied down" is but a conclusion, and the appellant made no effort to bring out the facts as to how water and gas had been brought into the building or how any former plumbing had been connected up, either to the building or to the land. It does appear that there were no double walls in this building and that the plumbing could not have been installed in the usual manner. If water and gas had been brought in through pipes laid underground they could well have been brought within the shell of the building without having been attached thereto in any manner. Assuming that the installation of plumbing fixtures in the usual manner would be a sufficient attachment of the building to the land to make it a part of the realty, there is no evidence here which would establish the requisite facts. Two pictures of the building, which are in the record, suggest the probability that better evidence of annexation to the land was not available.

[5] Moreover, there was some evidence tending to indicate that the appellant had knowledge that the building was owned by others and that he waived any rights thereto which he might otherwise have had. The appellant's testimony indicates that he knew the purpose for which this building had been used, and that he was familiar with the surrounding facts. In view of his general knowledge, his failure to testify with respect to facts usually brought out in such a case seems significant. The city clerk testified that he took part in the transaction by which the land was sold to the appellant; that, while he did not discuss the ownership of the building with the ap-

pellant prior to the sale, "it was the land only that was offered"; that shortly after the sale he asked the appellant if he would lease the land to a friend of his who owned the building; and that the appellant replied that he would be glad to talk to this friend about it. This friend testified that she then went to see the appellant and asked him if he wanted her to remove her fixtures; that he told her to let matters rest until around the first of April; that shortly after the first of April he came to her and asked her what she considered the building worth; and that he did not at any time tell her to get the building off the property. The evidence, as a whole, justifies the inference that the appellant knew that the building was owned by others, and that he waived any right to object to the fact that it was not removed at an earlier time.

The meager nature of the evidence on the appellant's part, together with the other evidence and inferences therefrom, justify the court's findings, and the decision on the controlling question of fact cannot be disturbed on appeal.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

76 Cal.App.2d 620

REILLY v. CALIFORNIA STREET CABLE R. CO. et al.

Civ. 13033.

District Court of Appeal, First District, Division 2, California.

Oct. 29, 1946.

1. Appeal and error 🔑996

Where jury could impose liability on a defendant on more than one theory, court would not attempt to look behind verdict to ascertain theory adopted by jury.

2. Negligence 🔑15

Although negligence of one defendant may be greater than that of another, injured third party may recover from both or either.

3. Automobiles 🔑245(50)
Carriers 🔑320(30)

Whether negligence of truck driver or of cable car operator or both was proximate cause of collision and resulting injury to passenger in cable car was for jury.

4. Automobiles 🔑244(19)

Testimony that truck driver failed to stop at stop sign and collided with cable car on intersecting street authorized verdict against truck company in favor of injured cable car passenger.

5. Appeal and error 🔑1064(1)

In action by injured cable car passenger against cable company and truck company, instruction given at request of cable company that a motorist about to cross tracks of a moving street car must use reasonable care to yield right of way when it is reasonably necessary to do so in order to avoid a collision was not prejudicial to truck company.

6. Carriers 🔑300

A cable company had right to operate cable car in street along its tracks but company had duty to exercise ordinary care in operation thereof to avoid collision with other persons and vehicles using public street.

7. Carriers 🔑321(12)

Instruction that it was duty of cable company to exercise ordinary care in operation of cable car to avoid collision with other vehicles using public streets was not objectionable as misleading in defining degree of care with which cable company was charged, since instruction obviously related to duty owed by cable company to other vehicles using public streets rather than duty owed to passenger.

8. Appeal and error 🔑880(2)

Where jury returned verdict against both cable company and truck company in cable car passenger's action for injuries sustained as result of collision between cable car and truck, truck company could not complain on any ground of instruction which stated cable company's duty to passenger.

9. New trial 🔑163(2)

Where question of excessiveness of damage award was raised, trial judge, by his denial of a new trial, indicated that he determined that verdict was not excessive.

10. New trial 🔑157, 159

On motion for new trial because of excessive damage award, court has power to consider the evidence anew to determine anew the facts and to set aside the verdict, if it is not just.

11. Appeal and error 🔑1004(3)

Upon appeal from a damage award, decision of trial court and jury cannot be set aside unless verdict is so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on part of jury.

12. Damages 🔑132(3)

$11,000 for fracture of sacrum, fracture of spine, fracture of two ribs, various contusions resulting in hospitalization, permanent injuries and reduction in ability to work of unmarried female office secretary 49 years old and wherein actual damages amounted to $2,130.90 was not excessive.

13. Courts 🔑90(1)

While other similar cases, as respects damage awards, furnish no precise or accurate basis for comparison, they may be resorted to by appellate courts as of some guidance.

14. Carriers 🔑321(12)

In action by cable car passenger against cable company and truck company for injuries sustained in a collision between cable car and truck, where jury was instructed as to city's authority to erect stop signs as to requirement for driver of a vehicle approaching such a sign to stop, and that the term "vehicle," as so used, did not apply to a device moved by human power or used exclusively upon stationary rails and such rules were given concrete application to truck company, cable car company could not complain that court did not elaborate on its exemption. Vehicle Code, §§ 31, 457, 552, 577.

15. Trial 🔑241

The Vehicle Code section dealing with application of certain chapters of code and designed obviously as a guide to lawyers and judges rather than as laying down a rule of action or conduct for motoring public and which could not have enlightened jury but might easily have led to confusion was properly eliminated from instruction. Vehicle Code, § 457.

16. Automobiles 🔑246(47)

In action arising out of collision between cable car and truck at an intersection at which stop signs were posted on all four corners, statute pertaining to motor vehicles entering through highway had no place in the instructions. Vehicle Code, § 552.

17. Appeal and error 🔑110, 870(6)

An order denying a new trial is not an appealable order but it may be reviewed on appeal from the judgment itself, hence an appeal from such an order was dismissed. Code Civil Procedure, §§ 956, 963.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J Lazarus, Judge.

Action by Alice G. Reilly against California Street Cable Railroad Company and others for concurrent negligence resulting in a collision in which plaintiff was injured. From a judgment for plaintiff, defendants appeal.

Affirmed.

Cooley, Crowley, Gaither & Dana, of San Francisco, for appellant California Street Cable R. Co.

Bronson, Bronson & McKinnon, of San Francisco, for appellant Grace Bros. Brewing Co.

M.Mitchell Bourquin and John Healy, both of San Francisco, for respondent

GOODELL, Justice.

The respondent sued the appellants Cable Company and Grace Brothers and the latter's driver, for concurrent negligence resulting in a collision in which respondent was injured. She recovered a verdict of $11,000, against all defendants, and from the judgment entered thereon they appeal.

On June 29, 1943, shortly after 9 a. m. respondent was a passenger in the front seat on the right-hand side of the open, forward section of a cable car descending easterly on California Street between Grant Avenue and Kearny Street, in San Francisco, where the grade is 13½%. A truck and trailer of Grace Brothers, driven by appellant Ward, was traveling southerly on Kearny, approaching California. It drove into the intersection and the cable car, coming down the hill, collided with the trailer. The impact threw the respondent from the car to the street.

A stop sign had been installed by the city authorities at each of the four entrances to the intersection.

The Grace Bros. Brewing Company's Appeal.

Grace Brothers' first point is that the Cable Company's negligence was the sole proximate cause of the accident. This is but another way of saying that Grace Brothers were not negligent, or, if they were, their negligence was not a proximate cause of the collision.

The verdict of course implied a finding that the truck, as well as the cable car, was negligent.

[1-3] Appellant claims that the Cable Company did not discharge its duty as a carrier, of "utmost care and diligence" to its passenger (sec. 2100, Civ. Code) and could not have done so while operating its antiquated equipment; further, that the cable car "could not blindly and negligently proceed into the intersection on the assumption that the truck would give way." These arguments do not touch the point, for however negligent the Cable Company may have been, the question now presented is simply with respect to Grace Brothers' negligence. Whether the jury found that the Cable Company failed in its highest duty to its passenger or simply failed to use ordinary care, is of no consequence *because the jury in any event fastened liability on the Cable Company.* "In such a situation appellate courts will not look behind the verdict in an attempt to ascertain the theory adopted by the jury". Schultheiss v. Los Angeles Ry. Corp., 11 Cal.App.2d 525, 528, 54 P.2d 49, 50. That, however, does not help Grace Brothers, for even though the negligence of one defendant may be greater than that of another, (a question upon which we are not called upon to pass), the injured third party may recover from both or either. Smith v. Schwartz, 14 Cal.App.2d 160, 164, 57 P.2d 1386, 1387. The case just cited holds that "in order for one driver to establish that the independent negligence of the other was the sole proximate cause of the collision, it must appear that his own negligence was so disconnected in time and nature as to make it plain that the damage occasioned was in no way the natural or probable consequence of the negligence of him thus seeking to be relieved from liability." It is apparent from the verdict against both corporate defendants that Grace Brothers did not convince the jury on that question of fact. In the same case it is said, "the question of whether the negligence of one driver or both was the proximate cause of the collision is one of fact to be determined by the jury, * * * and if there be evidence to support such determination, it cannot be disturbed on appeal. [Citations]". See also Day v. General Petroleum Corp., 32 Cal.App.2d 220, 235, 236, 89 P.2d 718; and Taylor v. Oakland Scavenger Co., 17 Cal.2d 594, 602, 110 P.2d 1044.

[4] There is ample evidence to hold Grace Brothers. It is sufficient to refer to the testimony of several witnesses who saw Ward drive through the stop sign and keep on going directly into the path of the cable car—some said as fast as 10 to 15 miles an hour. Granting that Ward testified he stopped or was "barely rolling," the jury could have believed that he did not stop at all which, as the jury was instructed, was negligence as matter of law.

[5] Grace Brothers' second point is that prejudicial error was committed in the instructions to the jury. At the request of the Cable Company the jury was instructed that "it is the duty of the driver of a motor vehicle who is approaching and about to cross the tracks of a moving street car *to use reasonable care to yield the right of way to such street car when it is reasonably necessary to do so in order to avoid a col*

lision with said street car. The right of way means the right to the immediate use of the highway." (Emphasis ours.) It is difficult to see how this instruction conferred, as counsel claim it did, "an absolute and pre-eminent right of way upon the cable car" or subordinated the truck's rights. This language finds direct support in Arnold v. San Francisco-Oakland Terminal Rys., 175 Cal. 1, 5, 164 P. 798, 800, where it is said: "'A street car cannot go upon the street except upon its rails, and hence it has the better right to that space, *to which others must yield when necessary.*' [Citations]. It was the duty of Arnold, upon approaching the crossing, to give way to a car of the defendant which was about to pass at the same time, *if necessary to avoid a collision,* since he could give way while it could not. * * *." (Emphasis ours.) See also New York Lubricating Oil Co. v. United Railroads of San Francisco, 191 Cal. 96, 100, 215 P. 72.

[6] Primm v. Market St. Ry. Co., 56 Cal. App.2d 480, 132 P.2d 842, 845, is relied on in this attack but the instruction there held to be "not entirely correct as applied to intersections" was so much stronger than that given in this case that it warrants no comparison at all. It told the jury—which the instruction now discussed did not—that "A street car has from necessity a right of way * * * paramount to that of persons and ordinary vehicles, though this superior right is not exclusive, * * *." On the other hand it was said in Aungst v. Central California Traction Co., 115 Cal. App. 113, 116, 1 P.2d 56, 57, citing O'Connor v. United R. R., 168 Cal. 43, 141 P. 809, that street cars "have no absolute or pre-eminent right of way over intersections. * * *." In the Primm case it was said, "The rule applicable to the facts of this case is set forth in Wright v. Los Angeles Ry. Corp., 14 Cal.2d 168, 173 [93 P.2d 135]; '* * * it is generally conceded that, on approaching an intersecting street, the duties of a street-car motorman and those of the driver of an automobile which is about to cross the street-car tracks at such intersection, are reciprocal and that each is required to approach the intersection with due regard for the rights of the other [citations]'". In an instruction given at the plaintiff's request the jury was told that "While the defendant, * * * Railroad Company, in this case had the right to operate its car along the track maintained by said defendant on California Street and across Kearny * * *, it was the duty of said defendant to exercise ordinary care in the operation thereof to avoid collision with other persons and vehicles using the public streets * * *." That instruction, while not speaking of *reciprocal* rights at intersections, conveyed to the jury the same thought as that expressed in the Wright case. Grace Brothers attribute to that instruction the same vice as that attributed to the one first criticized, in that it emphasized the idea of an absolute right at an intersection and "confirmed the error of the instruction earlier discussed and * * * enhanced the prejudice". But it is difficult to see how it can be attacked on that or any other ground. The right of the Cable Company to operate cannot be questioned, and the remainder of the instruction correctly stated the Cable Company's duty toward other vehicles and pedestrians (see Shipley v. San Diego Electric Ry. Co., 106 Cal.App. 659, 661, 289 P. 662.)

[7, 8] It is claimed, further, that the instruction just quoted was "misleading and confusing in defining the degree of care with which the cable car company was charged". The instruction only pretended, obviously, to state the duty owed by the Cable Company to "other persons and vehicles using the public streets", not that owed to its passengers. In another instruction, of which Grace Brothers also complain, the jury was told that the Cable Company "was under the duty of exercising the highest degree of care to avoid any injury to the plaintiff". The charge of confusing the jury is not made out because the jury, apparently, was not confused. As said in discussing Grace Brothers' first point, the jury brought in a verdict against the Cable Company and whether it was based on a failure to use the highest degree of care or to use only ordinary care does not matter. Grace Brothers are not in a position to complain on any ground, of the instruction which stated the carrier's duty to its pas-

senger. See McKinnon v. United Railroads of San Francisco, 55 Cal.App. 96, 101, 203 P. 122.

[9-11] The Brewing Company (but not the Cable Company) claims also that the award of $11,000 was excessive. The trial judge was called on to exercise his discretion on this question and his denial of a new trial indicates that he, with power to "consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just", considered the verdict not excessive. "Upon appeal, the decision of the trial court and jury on the subject cannot be set aside unless the verdict is 'so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury.' [citations]." Hale v. San Bernardino Valley Traction Co., 156 Cal. 713, 715, 106 P. 83, 84; Lahti v. McMenamin, 204 Cal. 415, 419, 268 P. 644; Mudrick v. Market Street Ry. Co., 11 Cal.2d 724, 735, 81 P.2d 950, 118 A.L.R. 533.

[12] Actual damages in this case came to $2,130.90.

At the time of her injury respondent was 49, unmarried, and was working as an office secretary. Her injuries consisted of a fracture of the sacrum; a fracture, with crushing, of the sixth dorsal spine, and the fracture of two ribs (on a plane with the crushed vertebra). She also suffered contusions. She was confined to the hospital for one month. She wore a brace for three months and when she attempted to get along without it had to resume its uses, finally discarding it on October 18, 1943. Prior to the accident she was well and was able to work a full day, but when she returned to work, after three and a half months absence, she was able to work only from 10:30 a. m. until about 4 p. m., and, at that, found it difficult to keep going until 4. She testified to more or less constant pain in the sacral region from which she got relief by standing, and pain between her shoulders (the sixth dorsal spine is between the shoulders) which pains kept her awake nights, necessitating the taking of sedatives. She had been under the constant care of her doctor up to the time of trial and had undergone osteopathic treatment twice a week for 14 months by a specialist. She had had to give up all her numerous former social activities, in order to conserve her strength so that she could carry on her daily work, even at shortened hours. Respondent's doctor, who had known her for some years, testified to a marked change in her appearance and nervous condition as a result of the accident. Respondent testified to pains in her legs and back at times, and to severe headaches, and the pains in the back were worse when she was working at the office under pressure. In her doctor's opinion some of her symptoms would be permanent. Respondent testified that she worried as to the possible future impairment of her earning power.

[13] Counsel for appellant concede that there is no arbitrary standard by which claimed excessiveness can be tested, and cite no cases involving damage awards for similar injuries. However we have found a case (McNown v. Pacific Freight Lines, 50 Cal.App.2d 221, 227, (122 P.2d 582) where a woman plaintiff six years younger than respondent suffered a dislocation of her coccyx, and was confined to the hospital one week less than she. The injuries in the instant case seem to be considerably more serious than those in that case. An award by the jury of $10,000, was attacked as excessive but held to be not so. We appreciate that while other somewhat similar cases furnish no precise or accurate bases for comparison, they are nevertheless continually resorted to by appellate courts as of some guidance. E. g. Ringis v. Otting, 63 Cal.App.2d 88, 92, 146 P.2d 427. See Power v. California Street Cable R. Co., 52 Cal. App.2d 293, 126 P.2d 4.

In view of the respondent's injuries, of the doctor's testimony as to the probability of permanent trouble, and of the uncertainty as to the continued capacity of the respondent to work, we cannot say that the award was excessive. The respondent is an unmarried woman, entirely dependent on herself for support. The doctor has testified to the marked change in her appearance and nervous condition as a consequence of this accident. When in addition to this consideration is given to the elements of pain and suffering and the complete loss of social life, the award does not suggest passion or prejudice.

The Cable Company's Appeal.

The principal complaint of the Cable Company is that the jury received the impression from the instructions that the cable car was bound, just as were motor vehicles, to stop at the nearest or westerly line of Kearny Street because of the stop sign facing west.

The jury was instructed that the vehicle code provides that it is "lawful for local authorities of this City and County to designate any intersection under its exclusive jurisdiction as a stop intersection and erect stop signs at one or more entrances thereto.

We have already seen that there were stop signs at all four entrances to this intersection. That fact having been proved, the jury, in the absence of an appropriate instruction, might well have received the impression that the stop sign facing west obligated the cable car to stop on the westerly line of Kearny just as much as the stop sign facing north obligated the truck to stop on the northerly line of California. But by an instruction proposed by the Cable Company the jury was told "that Section 577 of the Vehicle Code * * * provided as follows:

"'The driver of any vehicle upon approaching any entrance of the highway or intersection signposted with a stop sign as provided in this code * * * shall stop before entering the nearest crosswalk, or if none, then on the limit line marked otherwise, before entering such highway or intersection.'" And further:

"You are instructed that Section 31 of the Vehicle Code * * * provided as follows: * * * 'A vehicle is a device in, upon or by which any person or property is or may be propelled, moved or drawn upon a highway excepting a device moved by human power or used exclusively upon stationary rails or tracks.'"

In addition to the instructions proposed by the Cable Company quoted above, dealing with sections 577 and 31, the same defendant also tendered the following, which were refused:

"You are instructed that Sec. 457 of the Vehicle Code * * * provided as follows: '457. *Scope of Division.* The provisions of this division, except those of Chapters 4 and 5, relating to the operation of vehicles refer exclusively to the operation of vehicles upon the highways unless a different place is specifically referred to in a given section. The provisions of Chapters 4 and 5 of this division apply throughout the State unless otherwise indicated'".

"In connection with Sections 552 and 577 of the Vehicle Code which I have just read to you, I instruct you that *such sections do not apply to the operator of a cable railroad in approaching a through highway. These sections apply to the operators of automobiles and trucks and similar vehicles but have no application to the operator of a cable car such as we have in this case and which moves exclusively upon stationary rails or tracks.*"

That part of the last proposed (and rejected) instruction which we have emphasized will be seen to be an amplification of the instruction based on section 31, which *was* given, the language of which in defining a "vehicle" excepts *"a device * * * used exclusively upon stationary rails or tracks."*

[14] It is the contention of the Cable Company that the mere giving of the language of section 577 and section 31 did not fully and fairly instruct the jury on the subject involved. Counsel say "A close analysis and study of the sections reveals to the trained mind that the operation of a cable car was not bound by the terms of section 577. The matter, however, is not clear without study." They invoke the rule that in many instances the mere language of a code section may require further instructions for clarification, citing People v. Adams, 79 Cal.App. 373, 377, 249 P. 536; Formosa v. Yellow Cab Co., 31 Cal.App.2d 77, 87 P.2d 716, and Pemberton v. Arny, 42 Cal.App. 19, 183 P. 356. In all three cases the rule is discussed but in none of them is it held that the court erred. People v. Adams was a forgery case and it was held that the state of the record did not warrant the giving of the rejected instruction. In Pemberton v. Arny, the court

instructed in the language of the motor vehicle act and on appeal it was held that no interpretation or enlargement of that language was required. In the Formosa case, just as in this case, the court gave instructions in the language of the vehicle code and refused others in amplification thereof. There the court (31 Cal.App.2d 77, 84, 87 P.2d 716, 719), in approving such action had this to say: "The Motor Vehicle Act * * * and its successor the Vehicle Code were passed by the legislature primarily for the purpose of guiding the motoring public. The language is plain and concise, and not couched in legal verbiage that is baffling to a juror. Under such circumstances, the giving of explanatory, or as they are here termed, specific instructions as to the legal effect of the wording used, is not mandatory upon the trial court. Instructions based on code provisions should follow the wording of the particular section involved, and when confusing or couched in legal terms should be explained, but when the language of the section is unambiguous and clearly stated without legal embellishments, no explanatory instructions are necessary. It is incumbent upon the trial court to determine whether or not a code section should be explained."

"It should be unnecessary to say that there is no law requiring the court to repeat an instruction once given or to amplify unnecessarily upon propositions which to a jury of ordinary intelligence would be apparent from the instructions given." Sharpless v. Pantages, 178 Cal. 122, 125, 172 P. 384, 385.

There is a strong reason why, in our opinion, no explanation or amplification was needed and that is, that the reading of the language of section 31 with its exception of devices "used exclusively upon stationary rails or tracks" was immediately followed by this, "You are instructed that if you find from the preponderance of the evidence that defendant, Cecil M. Ward failed to bring his truck to a stop before entering the nearest crosswalk of the intersection of California and Kearny Streets, that then, if you so find said defendant was guilty of negligence as a matter of law."

This applied the general rule theretofore read to the jury, to Ward and his truck incisively and with particularity. The fact that no similar instruction was fitted to the Cable Company singled out the truck alone as subject to obedience to stop signs and conspicuously left out the cable car.

[15] Section 457 of the Vehicle Code does not deal with physical factors such for example as speed, turns or signals, but with the application of certain chapters of the code. Its language was designed obviously as a guide to lawyers and judges rather than as laying down a rule of action or conduct for the motoring public. It could not have enlightened the jury on any phase of this case, and might easily have led to confusion and perplexity. The remainder of the instruction, as already noted, was a mere expansion of what the jury had been already told.

[16] Section 552 had no place in these instructions. It reads: "Vehicle Entering Through Highway. The driver of any vehicle which has stopped as required by this code at the entrance to a through highway shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard, but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on the through highway shall yield the right of way to the vehicle so about to enter or cross the through highway."

Section 552 obviously relates to the approach of two *motor* vehicles. Counsel for the Cable Company, then, are not altogether consistent in urging that this instruction should have been given, for, as we have seen, they strenuously urge—and properly so—that the cable car is not a "vehicle" within the purview of the code. It was not at all applicable.

The case of Adrian v. Guyette, 14 Cal. App.2d 493, 58 P.2d 988, cited by the Cable Company is not comparable. There the court left to the jury several questions of law. Here the court read to the jury without change an instruction composed by the Cable Company's counsel, and simply declined to give a further instruction which was repetitive in part and which otherwise dealt only with a matter of statutory construction which might conceivably have been "baffling to a juror" (Formosa case, supra).

We find no error in the record.

[17] The Cable Company appeals, also, from the order denying a new trial, which is not an appealable order. Sec. 963, Code Civ.Proc.; 2 McKinney's Digest Recompiled, p. 161, § 74. On an appeal from the judgment itself such order is reviewable (sec. 956, Code Civ.Proc.; Casner v. Daily News Co., 12 Cal.2d 402, 404, 84 P.2d 1032). Accordingly, that appeal is dismissed.

The judgment is affirmed.

NOURSE P. J. and DOOLING, J., concur.

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SECOND SERIES

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29 Cal.2d 184

MEYERS v. EL TEJON OIL & REFINING CO.

L. A. 19804.

Supreme Court of California, in Banc.

Nov. 1, 1946.

Rehearing Denied Nov. 25, 1946.

1. Corporations ⚷152

A resolution of the board of directors declaring a dividend, even though it is unlawful in its inception for lack of a duly held meeting, can be ratified by the board of directors and such ratification does not require the holding of a regular meeting of the board or the passing of a resolution declaring the ratification. Civ.Code, §§ 305, 307, 307a, 307b, 363.

2. Corporations ⚷152

Where a dividend was declared at a special meeting attended by only four of seven directors, and there was no notice of the meeting or waiver thereof or consent to the meeting or approval of minutes as required by the Code, evidence that each of the seven directors returned the cash payment and accepted in exchange a note and that all the notes were carried as notes payable upon subsequent financial statements of the corporation and that one of them had since been paid, supported finding that the irregularity of the resolution declaring the dividend was cured by subsequent ratification. Civ.Code, §§ 305, 307, 307a, 307b, 363.

3. Corporations ⚷152

A ratification has retroactive effect and ratification of an irregularly declared dividend must be regarded as authorized by board of directors as of the time when it was declared.

4. Bills and notes ⚷94(1)

Where irregularly declared dividends had been ratified and a director returned his dividend and accepted a note for the amount thereof, the note was supported by a consideration.

5. Bills and notes ⚷452(1)

That corporation had defaulted in payment of dividends on preferred stock was no excuse for not paying note given years before in exchange for cash dividend on common stock since each holder of common stock acquired a vested right to the payment of the dividends which could not be defeated by later revocation of dividend without his consent. Code Civ.Proc. § 956a.

6. Appeal and error ⚷173(1)

Where defense in trial court was expressly limited to illegal meeting at which dividend was declared, defendant could not urge on appeal that dividend was not declared out of surplus or net profits. Civ. Code, § 346.

7. Corporations ⚷155(5)

In action by stockholder seeking payment of a dvidend declared by corporation, plaintiff need not allege that the corporation had the necessary surplus or profits and any issue as to the availability of surplus or profits required for the declaration of dividends must be raised by the corporation. Civ.Code, § 346.

8. Corporations ⚷152

Evidence that payment of dividend in cash would have made the working capital a little short did not establish that corporation lacked the surplus or net profits essential to declaration of dividend. Civ. Code, § 364.

9. Bills and notes ⚷94(1)
Corporations ⚷155(4)

Where dividend declared did not render the corporation insolvent or bankrupt corporation could not have recovered dividend even if paid illegally, and a note given in exchange for dividend was supported by a consideration. Civ.Code, § 364.

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Walter J. Meyers against El Tejon Oil and Refining Company on a promissory note. From a judgment for plaintiff, the defendant appeals.

Judgment affirmed.

Prior opinion, see 169 P.2d 60.

Kendall, Howell & Deadrich, of Bakersfield, and Roy P. Dolley and Arthur B. Knight, both of Los Angeles, for appellant.

Calvin H. Conron, Jr., of Bakersfield, for respondent.

TRAYNOR, Justice.

On March 15, 1940, a dividend was declared upon defendant's common stock at a special meeting of defendant's board of directors attended by only four of its seven directors. No notice of the meeting was given to the directors as required by section 307a of the Civil Code, nor did the absent directors sign a waiver of notice or a consent to the meeting or an approval of its minutes as required by section 307b of the Civil Code. Plaintiff who was then vice-president of the corporation as well as one of its directors was present at the meeting. The dividend was paid in cash to all holders of common stock, but the seven directors who were also holders of such stock, immediately returned their dividends to the corporation and received in exchange promissory notes in amounts equal to their respective dividends. Only one of the seven notes has been paid. The present action was brought on April 14, 1944, to recover upon the one given plaintiff. The trial court found "that any irregularity in the declaration of the dividend of March 15, 1940, has been ratified and confirmed by [defendant] corporation" and entered judgment for plaintiff. Defendant appeals.

[1-4] Defendant contends that since the authority to declare a dividend is vested in the board of directors (Civ.Code, §§ 305, 363) and since the directors can pass a valid resolution only if the board is duly assembled for the purpose of transacting corporate business (Civ.Code, § 307; Pauly v. Pauly, 107 Cal. 8, 18, 40 P. 29, 48 Am.St.Rep. 98; Hotaling v. Hotaling, 193 Cal. 368, 377, 224 P. 455, 56 A.L.R. 734; Curtin v. Salmon River, etc., Co., 130 Cal. 345, 350, 62 P. 552, 80 Am.St.Rep. 132; see 6A Cal.Jur. 1097), the declaration of the dividend was invalid, and that therefore the corporation issued the note to plaintiff without consideration. A resolution of the board of directors declaring a dividend, even though it is unlawful in its inception for lack of a duly held meeting, can be ratified by the board of directors, and such ratification does not require the holding of a regular meeting of the board or the passing of a resolution declaring the ratification. Brown v. Crown Gold Milling Co., 150 Cal. 376, 387, 89 P. 86; Scott v. Superior Sunset Oil Co., 144 Cal. 140, 143, 77 P. 817; Hibernia Sav. & Loan Soc. v. Belcher, 4 Cal.2d 268, 276, 48 P.2d 681; see 6A Cal.Jur. 1181; 19 C.J.S., Corporations, §§ 1018–1024, pp. 495–507; 11 Fletcher, Corporations, § 5351. "Anything from which it may be clearly found * * * that the board as a board had agreed that the void act should be binding will suffice." Milligan v. G. D. Milligan Grocer Co., 207 Mo.App. 472, 233 S.W. 506, 510. Thus, in Hibernia Savings & Loan Soc. v. Belcher, 4 Cal.2d 268, 275, 48 P.2d 681, it was held that if authority to make the assignment there involved was vested only in the board of directors, the subsequent acquiescence of an absent director in the assignment made at a special meeting attended by only two of the three directors of the corporation constituted an implied ratification of the assignment. In the present case the record discloses that each director returned the cash payment and accepted in exchange a note similar to the one given plaintiff; that all of these notes were carried as notes payable upon subsequent financial statements of the corporation; and that one of them has since been paid. This evidence supports the finding of the trial court that the irregularity of the resolution declaring the dividend was cured by subsequent ratification of the dividend. In Milligan v. G. D. Milligan Grocer Co., supra, a dividend declared at an invalid meeting of the board

of directors was held to be ratified under similar circumstances. The court stated that "the fact that the dividend was credited on the books of the corporation to the individual stockholders immediately after it was purported to be declared, and had been permitted to so remain for about 18 months before this suit was brought, and that in the meantime at least one regular meeting of the board was held and no order made of record disaffirming * * * the dividend, * * * is sufficient to [support] a finding [of ratification]." 233 S.W. at page 510. Since a ratification has retroactive effect (see 19 C.J.S., Corporations, § 1023, p. 505) the dividend must be regarded as authorized by the board of directors as of the time when it was declared, and thus, plaintiff did not acquire the note without consideration.

[5] Defendant applied for the admission of additional evidence under section 956a of the Code of Civil Procedure that since the issuance of the note in 1940, defendant defaulted on the payment on dividends on its preferred stock, that the last dividend on that stock was paid in January, 1942, and that therefore the corporation by paying the note would violate its articles of incorporation, which provide that the dividends on the preferred stock are cumulative and payable before any dividends on the common stock are paid. It is immaterial, however, whether the corporation became delinquent on its preferred stock years after the dividend on the common stock was declared. Each holder of common stock acquired a vested right to the payment of the dividend, which cannot be defeated by later revocation of the dividend without his consent. Smith v. Taecker, 133 Cal.App. 351, 352, 24 P.2d 182; see Ballantine, Private Corporations, 502, 504, and cases there cited. Under these circumstances it is unnecessary to determine whether the taking of additional evidence would otherwise be proper.

[6-9] Defendant also contends that the dividend was not declared out of surplus or net profits as required by section 346 of the Civil Code. Defendant's answer to the complaint did not raise this issue, and at the trial defendant limited its defense to the issue that the dividend was declared at a meeting of the board of directors that was not properly held. When the trial judge stated at the trial: "I have looked over the answer. The only defense seems to be that it was a dividend that was not properly declared," counsel for defendant declared, "Our defense is that there was no legal meeting at which the dividend was declared." The issue whether defendant had sufficient surplus or net profits to declare a dividend is entirely different from the issue whether the board of directors had properly authorized the dividend, and cannot first be raised on appeal. Even in a complaint of a shareholder seeking the payment of a dividend declared by the corporation the plaintiff need not allege that the corporation had the necessary surplus or profits. Any issue as to the availability of the surplus or profit required for the declaration of a dividend must be raised by the corporation. See 11 Fletcher, Corporations, § 5365; Federal Mining & Smelting Co. v. Wittenberg, 15 Del.Ch. 409, 138 A. 347, 55 A.L.R. 8, 145; City Bank Farmers' Trust Co. v. Hewitt Realty Co., 257 N.Y. 62, 177 N.E. 309, 76 A.L.R. 885, 896; Bates v. Brooks, 222 Iowa 1128, 270 N.W. 867, 109 A.L.R. 1381, 1400; 13 Am.Jur. 736. Moreover, the testimony of defendant's secretary, on which defendant relies, to the effect that the payment of the dividend to the directors in cash "would have run our working capital a little short at that time" falls short of establishing that defendant lacked the required surplus or net profits. Furthermore, section 364 of the Civil Code, as it read when the dividend was paid to plaintiff and when he exchanged it for the note sued upon, provided that a corporation could recover an illegally paid dividend only if it had been declared insolvent or bankrupt. Since defendant could not recover the dividend that plaintiff exchanged for the note, the dividend was consideration for the note, even if it be assumed that the dividend was declared in violation of section 346.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

29 Cal.2d 137

REYNOLDS v. STATE BOARD OF EQUALIZATION.

Sac. 5765.

Supreme Court of California, in Bank.
Nov. 14, 1946.

Concurring and dissenting opinion on denial of rehearing.

Prior opinion 173 P.2d 551.

SHENK, Justice.

I favor a reconsideration of one important phase of this case and will state my reasons.

I am in accord with the application in this and in the companion case of Covert v. State Board of Equalization, 29 Cal.2d 125, 173 P.2d 545, of our constitutional provision (section 22 of Article XX) which prohibits the consumption of intoxicating liquors in any public saloon or public barroom, but provides that sales for consumption on the premises may be made in bona fide hotels, restaurants, or other public eating places. These provisions are not capable of misunderstanding and have been known to all liquor dealers and enforcement agencies and officers since 1934. A declaration by this court of what the Constitution plainly says in that regard is no news to them or to any one familiar with liquor control. That phase of the litigation is obviously correctly decided.

But I see no necessity or justification for reading into the Constitution a provision which has the effect of relieving an admitted violator of the law of the consequences of his unlawful acts. A revocation of his license should be compelled.

The same section of the Constitution (section 22 of Article XX) which authorizes the licensing and sale of intoxicating liquors also vests the regulation of the liquor traffic exclusively in the State Board of Equalization. That section says that that board shall have the power "to deny or revoke" any specific liquor license. The power to "suspend" is not included except by the action of this court. By section 22 of Article I of the same Constitution it is provided that "the provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." This means that when the Constitution speaks in unmistakable terms everyone subject to its mandate, including the executive, legislative and judicial departments, must comply. People v. City of San Buenaventura, 213 Cal. 637, 639, 640, 3 P.2d 3; People v. California Fish Co., 166 Cal. 576, 587, 138 P. 79; Matter of Maguire, 57 Cal. 604, 609, 40 Am. Rep. 125; McDonald v. Patterson, 54 Cal. 245, 247; Shay v. Roth, 64 Cal.App. 314, 316, 221 P. 967. Neither department may add to nor take away anything from its plain terms. There is no uncertainty or ambiguity about the term "revoke." Its plain meaning is to cancel and annul. To "suspend" plainly means to stop temporarily, to hold in abeyance. Without any doubt the framers of the constitutional provision deliberately omitted the word "suspend"—a word of common use in liquor regulations and enforcement—and likewise deliberately used the sole word "revoke" in that connection. When the term "suspend" was so deliberately omitted the court is not justified in changing the Constitution to that extent by inserting it.

If the language used in a constitutional provision plainly and unequivocally shows a certain and definite purpose to be accomplished thereby it is the duty of the courts to carry it into effect. Boca Mill Co. v. Curry, 154 Cal. 326, 97 P. 1117. It is as much the duty of the court to see that the plain provisions of the Constitution are not evaded as it is to see that they are not directly violated. Parker v. Otis, 130 Cal. 322, 62 P. 571, 927, 92 Am.St.Rep. 56. In the grant of power and the mode of its exercise there is an implied negation that what is included excludes that which is inconsistent, and that when a thing is to be done in a particular way it shall not be done otherwise. Martello v. Superior Court, 202 Cal. 400, 261 P. 476.

Courts are no more at liberty to add provisions to what is declared in the Constitution in definite language than they are to disregard existing express provisions of the Constitution. Ross v. City of Long Beach, 24 Cal.2d 258, 260, 148 P.2d 649; People v. Campbell, 138 Cal. 11, 15, 70 P. 918.

Since the same rule is binding on the legislative department the legislature had no more authority than the courts to insert in the Constitution something which is not there and was deliberately excluded. This is especially true of the attempt of the legislature to enlarge upon the powers of the board by the insertion of the word "suspend" in the Alcoholic Beverage Control Act of 1935 (Stats.1935, p. 1123, Gen. Laws, Act 3796). Furthermore, the Liquor Control Act of 1933 (Stats.1933, p. 1697) was not effective as a grant of power to "suspend" because the constitutional amendment in 1934 adopted the 1933 act only insofar as its provisions were not inconsistent with the constitutional section. Since the power to suspend is obviously inconsistent with the sole power to revoke, the 1933 act was superseded by the Constitution and became to that extent entirely ineffective.

EDMONDS, J., concurs.

29 Cal.2d 217

PEOPLE v. HILTON.

Cr. 4725.

Supreme Court of California, in Bank.

Nov. 6, 1946.

1. Homicide 🔑22(2)

Mere intent to kill is not equivalent of a "deliberate and premeditated intent" to kill within statute requiring first degree murder to be deliberate and premeditated. Pen.Code, § 189.

See Words and Phrases, Permanent Edition, for all other definitions of "Deliberate and Premeditated Intent".

2. Homicide 🔑22(2)

Under statute requiring first degree murder to be deliberate and premeditated, the word "deliberate" is an antonym of hasty, impetuous, rash, impulsive, and no act or intent can be premeditated unless it has been the subject of actual deliberation or forethought. Pen.Code, § 189.

See Words and Phrases, Permanent Edition, for all other definitions of "Deliberate".

3. Criminal law 🔑1186(4)

Where evidence, including defendant's confession, left no doubt that murder committed by defendant was murder of the first degree, instructions defining degrees of murder, their respective elements and burden of proof thereon, though erroneous, did not constitute prejudicial error. Pen. Code, § 189; Const. art. 6, § 4½.

CARTER, SCHAUER, and TRAYNOR, JJ., dissenting.

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Thomas Hilton was convicted of first degree murder, and an appeal was automatically taken in his behalf under Penal Code under section 1239(b).

Affirmed.

George Finucane, of Santa Maria, and Gene Harris, of Santa Barbara, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., Lawrence M. Parma, Dist. Atty., David S. Licker, Asst. Dist. Atty., both of Santa Barbara, and Thomas P. Weldon, Deputy Dist. Atty., of Santa Maria, for respondent.

SPENCE, Justice.

Defendant was convicted of first degree murder and was sentenced to pay the extreme penalty. Prior to the trial, defendant had withdrawn his plea of not guilty by reason of insanity. This appeal is automatic in pursuance of section 1239(b) of the Penal Code.

The commission of the murder was admitted by defendant. At the trial his confession was introduced in evidence. He did not take the witness stand in his own behalf, and he offered no defense. However, defendant claims that he was prejudiced by certain instructions given by the trial court defining the degrees of murder, their respective elements, and the burden of proof thereon. The challenged instructions are substantially the same as those which were condemned in the recent cases of People v. Thomas, 25 Cal.2d 880, 156 P.2d 7; People v. Bender, 27 Cal.2d 164, 163 P.2d 8; and People v. Valentine, 28 Cal.2d 121, 169 P.2d 1. But here, contrary to the situation in the cited cases, the evidence, including defendant's confession, stands uncontradicted and leaves no doubt whatever that the murder committed by defendant was murder of the first degree. Under these circumstances the verdict must be upheld pursuant to the constitutional mandate requiring that a judgment shall not be reversed because of the jury's misdirection "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const. art. VI, § 4½.)

Defendant, a native of Santa Maria, is 29 years of age. He is unmarried, having been divorced from his former wife. He is a high school graduate and a truck driver by occupation.

Sue Fouts, the deceased victim, was a happily married woman 41 years of age and a resident of Corcoran in Kings County. She traveled to Santa Maria on December 2, 1945, for the purpose of caring for her mother, Mrs. Swearingen, who was 73 years of age and in ill health. About 5:30 p. m. on December 5, Mrs. Fouts' nephew, Allan Stewart, brought defendant to the Swearingen home for dinner and introduced him to Mrs. Fouts. Stewart and defendant had been together in the afternoon and had had some drinks.

Following dinner in the Swearingen home, Mrs. Fouts, Stewart and defendant went downtown and each had a highball. After they returned to the Swearingen home, Stewart left, saying that he thought he would go back downtown for a short time. About 8 o'clock in the evening Mrs. Fouts and defendant decided to return to the downtown section of Santa Maria and look for Stewart. When they arrived downtown, defendant, without authority to do so, secured the truck of his employer from a service station where it had been left for repairs. He and Mrs. Fouts rode about town and had a few drinks. About midnight they went to the Chew Cafe in Santa Maria, where Mrs. Fouts had some Chinese food and defendant drank some beer.

The evidence as to what transpired between that time and the time of the murder is found in defendant's confession, made on December 13 to the deputy district attorney. That confession was made in the presence of, and was transcribed by, a shorthand reporter who testified at the trial. Defendant stated that after leaving the Chinese cafe he drove Mrs. Fouts to the Rosemary Farm on the outskirts of Santa Maria. There they stopped and talked about "juke box" records "and things." Then defendant drove on "a little ways" and again turned off the highway and stopped the truck. Previously he had told Mrs. Fouts that she should drive, and had said to her, "I ought to take you out and cut your throat." She had laughed, thinking that he was joking. After stopping the truck, defendant got out, walked around the side, and told Mrs. Fouts to move into the driver's seat. As she started to move over, defendant stabbed her in the throat with his pocket knife. She gasped; he stabbed "two or three times"; and her body fell forward and partially out of the truck.

Defendant said that he left the body lying upon the ground and proceeded to walk around the ranch for approximately half an hour. Then he returned to the truck, placed the body in it, and drove down the road to the home of one Jack Siler. He awoke Siler and requested the loan of a shotgun for duck hunting. Siler said that he did not have the gun. Defendant then proceeded to the home of one Tapscott in Santa Maria, with intent, so he stated, of there securing a gun to kill his ex-wife. Tapscott was not home. Defendant next drove out what is known as the Cuyama-Santa Maria Highway, a winding, narrow, mountainous road, which was familiar to him. At the widest point on this road he stopped, took the body from the truck, and deposited it down the side of a hill about 300 feet off the highway. He returned to the truck, and then decided to go back and disrobe the body so as to make its identification "a little slower." He proceeded to do this, and then drove on toward Bakersfield. He stopped at the first river crossing, where he threw his victim's clothes off the bridge. Subsequently some of the articles of clothing were recovered from the river by a searching party from the sheriff's office.

Along the road defendant stopped at a service station in McKittrick, where he tried to clean his clothes. He then continued on to Bakersfield, where his truck ran out of gasoline and he abandoned it on a side road. It was discovered there several days later by a deputy sheriff. The cab on the inside was covered with bloodstains. On the floor there was a small hand axe covered with bloodstains and traces of hair like that of Mrs. Fouts were found adhering to it.

From Bakersfield defendant hitch-hiked to Trona, where his ex-wife lived. His prime purpose was to kill her. He stayed around Trona for a few days and burglarized several houses in an attempt to find a gun with which to kill his ex-wife. He did not succeed in securing one or in finding her. He then hitch-hiked to Lone Pine. He assaulted one man who gave him a ride, striking the man's head with a bar of metal. He attempted to commit suicide, using the same knife with which he had killed Mrs. Fouts, but he slashed his wrists too high to have a fatal effect. He was arrested by a deputy sheriff at Lone Pine, Inyo County.

Defendant said that he had no reason to kill Mrs. Fouts, and he denied that there had been any sexual relations between them or any advances on his part. Whether there had been sexual relations could not be proved because of the extended time the body had remained exposed on the mountainside before it was discovered. Defendant stated that the liquor he drank did not affect him. He further stated as follows:

"Q. When did you make up your mind to kill her? A. About a couple hours before then.

"Q. While she was up at her house? A. No, it was when we were coming down town.

"Q. What caused you to decide to kill her? A. Oh, I got to thinking.

"Q. Thinking about what? A. I don't know if this is all necessary on this case or not.

"Q. Well, we would like to know if you could tell us. A. I have it all in my other confession.

"Q. You can go ahead and tell us that. A. I had a lot of trouble with my wife; she is my ex-wife, and she has been bothering me for quite awhile.

"Q. Did you tell Sue Fouts about your trouble with your wife? A. Yes, quite a bit of it.

"Q. What did Mrs. Fouts tell you? A. She just more or less said it was trifling.

"Q. Did she tell you to go back to your wife? A. No, just to forget it—she told me not to let it bother me.

"Q. Did that cause you to get mad at her? A. Oh, I been thinking for a couple weeks—I been thinking for a year of killing my wife.

"Q. Why were you mad at your wife? A. She had had me arrested ten times.

"Q. For what? A. Five times on disturbing the peace charges, one drunk, one kidnapping, one rape, one insanity, and one simple assault.

"Q. Where did this all happen? A. In Trona. * * *

"Q. Who did you commit this rape on? A. I didn't; I was acquitted of the charge. She brought all these charges at different intervals.

"Q. This insanity—what was that? A. She tried to have me committed to Patton. I was adjudged sane.

"Q. You were adjudged sane and they turned you loose; is that true? A. Yes. * * *

"Q. Getting back to Mrs. Fouts, how long had you known Mrs. Fouts? A. Probably five or six hours.

"Q. Was Wednesday, the 5th of December, 1945, the first day you met her? A. Yes.

"Q. That was the first time in your life that you had ever seen her; is that true? A. Yes.

"Q. When did you make up your mind to kill her? A. Subconsciously maybe when I was walking down from the house.

"Q. What caused you to get that idea in your mind, that you wanted to kill her. A. I always regretted I had not killed my wife when I had the opportunity; I was all mixed up.

"Q. Mrs. Fouts never said anything or did anything to you, and you had only met her four or five hours before? A. Yes.

* * *

"Q. Did Mrs. Fouts say anything to you when you stabbed her? A. She gasped.

* * *

"Q. As a matter of fact, she didn't know you were going to stab her? A. No.

* * *

"Q. When you left the Swearingen house with Sue Fouts what did you tell her you were going to do? A. I don't know. We were both feeling good and were going to go down and look for Allan; he had left early.

"Q. When you left the house did you intend at that time to kill her? A. Subconsciously; it might have been in the back of my mind.

"Q. You definitely made up your mind about 9:30 at one of these bars? A. When I got the truck, yes.

"Q. Did you decide where you were going to kill her—at what place? A. Yes.

"Q. When you started driving out on East Main Street to the Rosemary Farm you definitely made up your mind you were going to kill her. Is that true? A. Yes.

* * *

"Q. Just how much did you have to drink that night before you killed Sue Fouts? A. I started drinking about nine o'clock that day.

"Q. But you knew what you were doing all the time? A. Yes.

"Q. You weren't drunk? A. No.

"Q. And you weren't drunk when you killed her? A. No.

"Q. You knew what you were doing? A. Yes.

"Q. What reason did you have? Just tell us the reason, Mr. Hilton, why you killed her. Just tell us in your own words what the reason was. A. Like I said, I knew for a year, I definitely planned to kill my wife. I had it in my mind this Fall; it was always in my mind, and it kept getting later and later and I kept thinking about it; that's all I know, and I know that that day, why, it was on my mind all the time.

"Q. It is true that when you start drinking you get an inclination to kill some one? A. No, it has always been my wife I wanted to kill.

"Q. You do get that idea when drinking? A. It's worse when I drink. * * * I had been drinking all day, and I was thinking I ought to get that gun, borrow one from Tap or some one on the pretext of going hunting."

In view of the constitutional mandate (art. VI, § 4½), the foregoing uncontradicted evidence must be borne in mind in considering defendant's sole contention on this appeal, which is that "The trial court erred to the prejudice of defendant in instructing the jury relative to the elements of the two degrees of murder and the burden of proof thereon." It would serve no useful purpose to set forth the challenged instructions for, as above indicated, said instructions were substantially the same as those which were discussed and were held to be erroneous in People v. Thomas, 25 Cal.2d 880, 156 P.2d 7; People v. Bender, 27 Cal.2d 164, 163 P.2d 8; and People v. Valentine, 28 Cal.2d 121, 169 P.2d 1. It therefore appears that the giving of the challenged instructions constituted error, and we turn to the question of whether the error should be held to be prejudicial.

[1-3] Defendant concedes that "the crime stood admitted and the malice aforethought was unchallenged" and he further concedes that the evidence "was sufficient to sustain a verdict of murder in the first degree." As we view the record, however, there were many other facts which stood admitted and unchallenged, which last mentioned facts pointed unerringly to and impelled the conclusion that the murder was murder of the first degree. Thus it appears that it was some time after midnight on the night in question that defendant committed a brutal, unprovoked murder of a woman he had known but a few hours. Despite some drinking, defendant admitted that he was not "drunk" and that he "knew what [he was] doing all the time." With respect to the actual killing, the evidence is summarized in defendant's brief where it is stated: "The accused herein admitted uncontradictedly that he determined to kill the decedent and walked around to her side of the car with that specific intent." It is therefore clear that the uncontradicted evidence showed that the killing was "willful" as the stabbing was done with the specific intent to kill the deceased. But in People v. Bender, supra, 27 Cal.2d 164, at page 181, 163 P.2d 8, at page 18, this court pointed out that "it is obvious that the mere intent to kill is not the equivalent of a deliberate and premeditated intent to kill"; and in People v. Thomas, supra, 25 Cal.2d 880, at page 901, 156 P.2d 7, at page 18, it was stated that "The word 'deliberate' is an antonym of 'Hasty, impetuous, rash, impulsive' (Webster's New. Int. Dict. (2d. ed.)) and no act or intent can truly be said to be 'premeditated' unless it has been the subject of actual deliberation or forethought (id.)." The question therefore remains as to whether the uncontradicted evidence showed that the murder was "deliberate and premeditated" within the meaning of our statute defining murder of the first degree (Pen. Code, § 189). Here again the evidence is clear and uncontradicted and leaves no room for doubt. While the actual killing occurred some time after midnight, defendant admitted that he had "definitely made up [his] mind about 9:30" to kill Mrs. Fouts "when [he] got the truck"; and further that "subconsciously" that intention "might have been in the back of [his] mind" when he and Mrs. Fouts left the Swearingen home about 8 o'clock that evening. He further admitted that before leaving Santa Maria, he had determined upon the place where he would carry out his nefarious plan and that he had thereafter driven to that place. Manifestly, the killing had been the subject of actual and prolonged deliberation and forethought by defendant, the specific intent to kill the deceased having been formed about three hours before the actual killing and having been adhered to throughout the intervening time. Under these circumstances, the killing could not be regarded otherwise than as an act that was "willful, deliberate, and premeditated." (Pen.Code, § 189.) As we view the uncontradicted evidence presented, the jury could not properly have arrived at any verdict other than a verdict finding defendant guilty of murder of the first degree, and the only real question presented for the jury's determination was that of the penalty to be imposed. We therefore conclude that the error in the challenged instructions, dealing with the subject of the degrees of the murder, may not be treated as prejudicial.

The foregoing conclusion is not in conflict with the decisions in the Thomas, Bender, and Valentine cases cited above and is in line with our recent decision in People v. Bernard, 28 Cal.2d 207, 169 P.2d 636, where substantially similar instructions were given but were held not to have been prejudicial. In that case it was shown without conflict that the killing was committed in the perpetration of a robbery and by means of lying in wait. There, as here, the undisputed facts showed that the murder was murder of the first degree (Pen. Code, § 189). It therefore appears appropriate to conclude here with the concluding language found in the Bernard case at page 640 of 169 P.2d: "* * * Where the facts impel a conviction of murder of the first degree * * * and do not admit upon any view of the evidence of a finding other than of murder of the first degree, there is no occasion whatsoever to give instructions as to the differences between the degrees of murder. Hence, although the instructions as to such differences were manifestly erroneous, the errors cannot have prejudiced the appealing defendant." See, also, People v. Peterson, Cal.Sup., 173 P.2d 11; People v. Honeycutt, Cal.Sup., 172 P.2d 698; People v. Dorman, 28 Cal.2d 846, 172 P.2d 686.

The judgment is affirmed.

GIBSON, C. J., and SHENK, J., concur.

EDMONDS, Justice.

As I read the record in this case, the challenged instructions did not prejudice the defendant and, for that reason, I concur in the affirmance of the judgment.

CARTER, Justice.

I dissent. It is an unwarranted invasion of the province of the jury to hold that defendant was not prejudiced by the erroneous charge merely because, in the opinion of a majority of this court, the evidence "leaves no doubt whatever that the murder committed by defendant was murder of the first degree." The fact that concededly the evidence "was sufficient to sustain a verdict of murder in the first degree" is beside the point. Whether upon that evidence defendant should have been adjudged guilty of first degree murder or of a lesser crime, or acquitted, was for the jury and the jury alone to say. It is not within the power of a trial court, even upon uncontradicted evidence, to direct a verdict of guilty in a criminal case, nor is it within the power of an appellate court to direct such a verdict by indirection. Yet the majority opinion does just that in its conclusion that "As we view the uncontradicted evidence presented, the jury could not properly have arrived at any verdict other than a verdict finding defendant guilty of murder of the first degree, and the only real question presented for the jury's determination was that of the penalty to be imposed. We therefore conclude that the error in the challenged instructions, dealing with the subject of the degrees of the murder, may not be treated as prejudicial."

Defendant's uncontradicted account of the manner in which the killing occurred left for determination by the jury but one real issue (other than punishment), and it was upon that issue, deliberation and premeditation, that the utterly confusing and erroneous instructions had bearing. The effect of the erroneous charge was therefore to take from the jurors the one matter to be determined by them. In other words, the undisputed facts showed that defendant's crime was murder of the first degree, if his specific intent to kill the deceased was carried out with deliberation and premeditation. Whether these latter elements were present was the vital question for the jury under proper instructions. If the jurors were to be instructed in a vein which emphasized the rapidity with which thoughts may follow each other, fairness required a further instruction placing at least equal emphasis on the true meaning of the terms deliberation and premeditation. As stated in People v. Bender, 27 Cal.2d 164, 185, 163 P.2d 8, 20: "* * * While the jury may be told that the brain can function rapidly they must not be misled into thinking that an act can at the same time be hasty, hurried, and deliberate or impulsive, unstudied, and premeditated. The extent of the reflection in every case, if it is to pass the test, must fairly and reasonably meet the ordinary and unquestioned significations of the test words. It is irrefragable that (in cases of the type now before us) the statutes of California purport to authorize putting a person to his death only where his act of killing was truly deliberate and premeditated; i. e., was murder of the first degree."

From defendant's confession and the absence of any other evidence of motive it would seem that the murder was the result of his confused association of his rancor against his ex-wife with all women, so that in giving vent to his intense desire to kill his ex-wife, he stabbed Mrs. Fouts. There was apparently nothing to break this confused conception during defendant's prolonged spree of brooding, drinking, and visiting with Mrs. Fouts. It is true that the evidence, if submitted to the jury under proper instructions, would have supported a verdict of murder of the first degree, but under that evidence it would also have been possible for the jury to conclude that the murder was of a lesser degree in that, since defendant had seen and been introduced to Mrs. Fouts for the first time only a few hours before the killing, apparently the intent to substitute her as a victim in place of the ex-wife, was not arrived at as the result of a dispassionate, cool, and deliberate premeditation, but was the result of an impulse engendered during the short period the two were together. In short, had the jurors been properly instructed, they might or might not have concluded that the killing was "willful, deliberate, and premeditated," as those terms are used in the statute defining murder of the first degree (Pen.Code, § 189). A lesser verdict returned by them could not have been disturbed.

The jurors should have been told in substance that "Neither the statute nor the court undertakes to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent which is truly deliberate and premeditated. The time would vary with different individuals and under differing circumstances. The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly, but the express requirement for a concurrence of deliberation and premeditation excludes from murder of the first degree those homicides (not specifically enumerated in the statute) which are the result of mere unconsidered or rash impulse hastily executed." People v. Bender, supra, 27 Cal.2d 184, 185, 163 P.2d 8, 20; People v. Thomas, 25 Cal.2d 880, 900, 156 P.2d 7.

It marks no innovation in the law to state that even where there is undisputed evidence of first degree murder, convincing in the eyes of an appellate court, erroneous instructions which bear vitally upon the proper definition of the crime, must be deemed to have been prejudicial. Such has always been the law of this state. Thus it is said in People v. Valencia, 1872, 43 Cal. 552, at page 556: "We are not justified in saying that the error [an instruction omitting from the definition of murder in the first degree the essential qualities of deliberation and premeditation] was productive of no injury to the defendants, because we may be satisfied that the jury ought to have found from the evidence, as they did, that the defendants are guilty of murder in the first degree. The question as to the deliberation and premeditation of the defendants is one which is peculiarly the province of the jury to determine; and should we sustain the charge of the Court, because of the apparently satisfactory character of the evidence, that question would virtually be withdrawn from the jury."

Again it was said in People v. Chew Sing Wing, 1891, 88 Cal. 268, at page 270, 25 P. 1099, at page 1100: "There is no question arising in a trial for murder more peculiarly or purely one of fact than the one whether the killing was done with deliberation and premeditation, or in the decision of which so much is necessarily left to the sound sense, discretion, and experience of the jury, who, under the constitution, are made the exclusive triers of that issue. In People v. Ah Lee, 60 Cal. 85, 86, this court said: 'And we think it to be well settled in this state that it was error to instruct the jury that there were no circumstances in the case to reduce the offense below that of murder in the first degree. The question whether the killing was perpetrated with the deliberation and premeditation necessary to constitute it murder in the first degree was one which it was "peculiarly the province of the jury to determine."' * * *. [Nor can this court] weigh the testimony for the purpose of determining whether the verdict of the jury is not right upon the evidence [quoting from People v. Valencia, supra]."

Here the court did not submit to the jury any issue of fact whatsoever on the question of degree; not even in the erroneous instructions as to what would constitute premeditation and deliberation were the jurors permitted to determine any issue of fact. They were told that if there existed in the mind of the defendant at the time of the slaying "the specific intent to take life" then the offense "would of course be murder of the first degree." Defendant, by his own admission, conceded the existence of such specific intent. That fact never was questioned by the defendant. Hence the instruction that if that specific intent existed the offense "would of course be murder of the first degree," left the jury no possible alternative, unless they directly disobeyed that instruction, but to return a verdict of murder of the first degree.

In this case, therefore, there was not merely error in instructions, but a total failure, in effect, to accord the defendant a trial by jury.

For the foregoing reasons I would reverse the judgment.

SCHAUER, J., concurs.

TRAYNOR, Justice.

I dissent. I do not agree that "the jury could not properly have arrived at any verdict other than a verdict finding defendant guilty of murder of the first degree." In my opinion the jury could properly have arrived at a different verdict and it is not improbable that it would have done so had it been correctly instructed with respect to premeditation. The jury might reasonably have concluded that because of the confused state of defendant's mind he did not act with premeditation.

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76 Cal.App.2d 753

PEOPLE v. VAN HORN.

Cr. 496.

District Court of Appeal, Fourth District, California.

Nov. 8, 1946.

Hearing Denied Dec. 5, 1946

1. Commerce 🔑10

Provision of the Motor Carrier Transportation Agent Law that the law should apply to and regulate motor transportation agents in so far as their acts affect the carrying of passengers in interstate commerce in absence of action on part of Congress or Interstate Commerce Commission means that the law shall not apply where such federal action has been taken, irrespective of the extent to which the federal legislation is complete or efficient. Gen. Laws, Act 5130c, § 1 et seq.

2. Commerce 🔑8(12)

One engaged in arranging transportation for compensation for persons desiring to travel by automobile outside the state was not subject to Motor Carrier Transportation Agent Law and therefore not guilty of acting without a license, in view of regulation of such agents by the Interstate Commerce Commission though no license was required of them by commission. Interstate Commerce Act, § 203(b) (7a) (9), 49 U.S.C.A. § 303(b) (7a) (9); Gen. Laws, Act 5130c, § 1 et seq.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Thomas C. Van Horn was found guilty of violating the Motor Carrier Transportation Agent Law by acting as an agent without a license. Thereafter an order was entered granting the defendant's motion in arrest of judgment, and the People of the State of California appeal.

Order affirmed.

Robert W. Kenny, Atty. Gen., John F. Hassler, Deputy Atty. Gen., Thomas Whelan, Dist. Atty., of San Diego, and A. D. Orme, Deputy Dist. Atty., of Pasadena, for appellant.

F. W. Turcotte, of Los Angeles, John T. Holt and William H. Macomber, both of San Diego, for respondent.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, amicus curiæ in behalf of appellant.

BARNARD, Presiding Justice.

The defendant was charged with violating the Motor Carrier Transportation Agent Law, Stats.1933, p. 1011, amended, by Stats.1941, p. 1861, Deering's Gen.Laws, Act 5130c, by acting as such an agent without a license. The case was tried on stipulated facts and the defendant was found guilty. Thereafter, a motion in arrest of judgment was granted and the plaintiff has appealed from the order granting this motion.

The facts are not disputed and it is conceded that in May, 1945, the defendant was engaged in the business of arranging, procuring and furnishing transportation, for compensation, to persons desiring to travel between San Diego and points outside California by means of private automobiles operated in interstate commerce, for compensation, by casual, occasional and reciprocal car operators who were not engaged in such transportation as a regular occupation or business; that these motor vehicle operators, with whom the defendant arranged for interstate transportation of prospective passengers, traveled over highways of this state from San Diego to the line of an adjoining state as a part of an interstate trip; that the defendant had not applied for or received from the Railroad Commission of this state any license authorizing him to act as a motor carrier transportation agent; that he had not applied to the Interstate Commerce Commission for a license to operate as broker or agent; and that the private automobile operators with whom the defendant arranged for such transportation held no certificate or permit either from the State Railroad Commission or the Interstate Commerce Commission, nor was the defendant an agent for any carrier holding such a certificate.

The appellant argues that the sole question presented is whether Act 5130c is constitutional or whether it is invalid as being in conflict with federal regulations in the field of interstate commerce. On the other hand, the respondent contends that the sole question presented is whether his admitted acts constituted a violation of Act 5130c, at the time in question.

Section 1 of Act 5130c declares the public policy of regulating and controlling persons who offer to act as intermediaries between the public and such motor carriers of passengers for compensation as are not required to obtain, or have not obtained, a certificate from the Railroad Commission. Section 2 first defines a motor carrier transportation agent as one who sells or offers to sell or arrange for transportation over public highways which is to be furnished by a motor carrier as defined in this act. A motor carrier is then defined, in brief, as any one transporting or offering to transport passengers for compensation without holding a valid certificate or permit issued by either the Railroad Commission or the Interstate Commerce Commission. It is further provided that the act shall not apply to certain enumerated forms of transportation. It is then provided that, in the absence of action on the part of Congress or the Interstate Commerce Commission regulating or requiring licenses of motor carrier transportation agents (as defined in the act), acting as such agents for motor carriers carrying passengers in interstate commerce, this act shall apply to and regulate such agents. Section 3 makes it unlawful for any person to act as such motor carrier transportation agent without first obtaining a license, and other sections of the act then provide for the issuance of such licenses on certain conditions, including the furnishing of a bond, for prosecution of violations of the act, and for penalties for operating without a license.

The validity of Act 5130c was upheld by the United States Supreme Court in People of State of California v. Thompson, 313 U.S. 109, 61 S.Ct. 930, 85 L.Ed. 1219. In that case, the court pointed out that the commerce clause of the Constitution did not wholly withdraw from the states the power to regulate matters of local concern, with respect to which Congress has not acted, even though the regulation has an incidental effect upon interstate commerce and held that, in any event, until Congress undertook to regulate the matter in question there was nothing to prevent action by the state.

At that time there was no federal statute or regulation affecting the factual situation covered by Act 5130c, and with which we are here concerned. Part II of the Interstate Commerce Act relating to motor carriers was in effect, having been adopted in 1935. By the terms of section 303(b) (7a) of that act, as found in Title 49 U.S.C.A., the provisions of the act were made inapplicable to such transportation matters as those here in question "unless and to the extent that the Commission (the Interstate Commerce Commission) shall from time to time find that such application is necessary to carry out the national transportation policy declared in the Interstate Commerce Act."

Pursuant to the authority given by the clause of the act just quoted, the Interstate Commerce Commission, on March 21, 1942, made and entered its decision and order in Ex Parte No. MC-35 (33 Motor Carrier Cases 69, 3 Fed.Carrier Cases 202) by which it found and provided that the exemption of casual, occasional or reciprocal transportation of passengers by motor vehicle in interstate commerce for compensation, as contained in section 303(b) (9) of the act, should be removed "to the extent necessary and so as to make applicable all provisions of the act to such transportation when sold, offered for sale, provided, procured, furnished, or arranged for by any person who sells, offers for sale, provides, furnishes, contracts, or arranges for such transportation for compensation or as a regular occupation or business."

This order removed the exemption theretofore existing and made all the provisions of Part II of the Interstate Commerce Act applicable to the furnishing of such transportation as that with which we are here concerned. By the terms of that act, and the action of the Interstate Commerce Commission pursuant thereto, Congress had then undertaken to regulate the matter in question, to wit: the activities of an agent in connection with the procuring and furnishing of such transportation.

[1] The appellant argues that, even if some regulation over the matter in question has thus been provided by act of Congress and by action of the Interstate Commerce Commission, any such federal regulation is only partial and does not render Act 5130c invalid or unconstitutional under the rule that a state statute, enacted in the exercise of police powers, will be sustained even though it has an indirect and remote effect upon interstate commerce. Some of the things said in the opinions in People of State of California v. Thompson, 313 U.S. 109, 61 S.Ct. 930, 85 L.Ed. 1219, and Duck v. Arkansas Corporation Commission, 203 Ark. 488, 158 S.W.2d 24 (the latter case was affirmed in 316 U.S. 641, 62 S.Ct. 946, 86 L.Ed. 1727) support the argument thus made. Both of these cases involved situations existing prior to the adoption of the order in Ex parte No. MC-35. It is unnecessary to consider this question here in view of the provisions of our statute (Act 5130c). Originally this act contained the following: "The provision of this act shall apply, regardless of whether such transportation so sold, or offered to be sold, is interstate or intrastate." In 1941 this provision was eliminated and by amendment it was provided that this act should apply to and regulate such motor transportation agents insofar as their acts affected the carrying of passengers in interstate commerce "in the absence of action on the part of Congress or the Interstate Commerce Commission regulating or requiring licenses of" such agents. The problem before us, therefore, is not whether the regulation of the activities of such agents, in connection with interstate commerce, is one within the valid powers of the state but rather whether our state statute (Act 5130c) now imposes such regulation. The provision that this act shall apply to such activities in connection with interstate commerce in the absence of federal action can only be interpreted as providing that the act shall not apply where such federal action has been taken. Moreover, the applicability of the state statute is not made dependent upon the extent to which the federal regulation is complete or efficient in controlling the evils which gave rise to the legislation, but is made dependent entirely on whether or not federal action has been taken "regulating or requiring licenses of" the transportation agents defined in the act.

[2] It appears beyond question that Congress and the Interstate Commerce Commission, by the act and order above referred to, have now taken action "regulating or requiring licenses of" such motor carrier transportation agents. The order of the Interstate Commerce Commission (Ex parte No. MC-35) was made expressly to make the provisions of Part II of the Interstate Commerce Act applicable to such agents. The terms of that act, thus made applicable to such agents, require licenses of any such agents, who are referred to as brokers in that act, and provide for their regulation in a number of respects. The argument that these regulations are not sufficient to accomplish the end that is to be desired is beside the point. Federal action having been taken in this regard our statute is, by its own terms, made inapplicable. Nor does the fact, if it be a fact, that the private operators of automobiles carrying passengers in interstate commerce for compensation cannot be licensed under the federal act, because they are unable to comply with the necessary requirements for such licensing, affect the fact that licensing provisions and other regulations are by the federal act made applicable to agents who

sell or furnish, or offer to sell or furnish, transportation by motor carriers who do not hold a valid certificate or permit, being the same situation which is covered by the provisions of our state act. Federal action having been taken in the respect referred to in the last paragraph of section 2 of the state act (Act 5130c), the provisions of that act are no longer applicable to the factual situation here involved.

In a similar case, where the defendant was charged with violating the licensing provisions of our state act (Act 5130c), an order dismissing the action was affirmed by the appellate department of the Superior Court of the County of Los Angeles (People v. Edmondson, No. CR A 2160) and a petition for certiorari filed by the People was denied by the Supreme Court of the United States on October 14, 1946, 67 S.Ct. 47.

For the reasons given the order here appealed from is affirmed.

MARKS, J., concurs.

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76 Cal.App.2d 766

In re KAHAN'S ESTATE.

FARMERS & MERCHANTS NAT. BANK OF LOS ANGELES v. JEWISH NATIONAL FUND, Inc., et al.

Civ. 15444.

District Court of Appeal, Second District,
Division 2, California.
Nov. 13, 1946.

1. Wills 🔑184(4)

A codicil, executed within six months before testator's death and amending will executed over six years earlier, by adding to provision thereof that trustee should pay trust fund, after life tenants' deaths, to a named organization for charitable work, a clause providing that proceeds of such charitable legacy should go to another named organization if such work failed, did not revoke charitable legacy and effect republication of will, so that such legacy was not subject to reduction to one-third of testator's net distributable estate.

2. Wills 🔑179

Revocation of will by new will repeating same dispositive plan is deemed inseparably related to and dependent on legal effectiveness of new will, and, if it fails to give effect to testator's twice declared purpose, revocatory clause falls.

◆

Appeal from Superior Court, Los Angeles County; J. W. Mullin, Jr., Judge.

Proceeding by the Farmers & Merchants National Bank of Los Angeles for probate of the will of Jacob Kahan, deceased, contested by Colman Kahan and others. From an order that only one-third of testator's distributable estate could go to charity, the Jewish National Fund, Inc., appeals.

Reversed, with directions.

Gustave L. Goldstein and Hanna and Morton, all of Los Angeles, for appellant.

Louis Thomsen, of Los Angeles, for respondent Kahan.

McCOMB, Justice.

Jacob Kahan died on October 30, 1942, leaving a will dated January 31, 1936, and a codicil thereto dated August 24, 1942. The probate court held that since decedent did not survive more than six months after the execution of the codicil to his will and left one or more brothers as heirs only one third of the distributable estate could go to charity. From this holding appellant, a charitable legatee, appeals.

Decedent by his will dated January 31, 1936, left the residue of his estate to "* * * the Farmers and Merchants National Bank, in trust, nevertheless, for the following uses and purposes:

"a) To pay the net income therefrom in semi-annual installments to my brother, Mowshe Kiwowitz Kahanowitz, who now resides at Priluky, Poltaver Guberna Ukrania, Russia.

"b) Upon the decease of my brother, Mowshe Kiwowitz Kahanowitz, the net income from the trust fund shall be paid in semi-annual installments to his wife during her natural life.

"c) Upon the death of my brother abovenamed, Mowshe Kiwowitz Kahanowitz, and his wife, the trust shall terminate, and the trustee, the Farmers and Merchants National Bank of Los Angeles, California, shall pay over and turn over the trust fund remaining in its hands, as trustee, to the Jewish National Fund, to be used for the Jewish Chalutzim in Palestine in their work.

"d) The Trustee shall hold and manage the property as a trust fund according to the way permitted by law."

Subsequently on August 24, 1942, he executed a codicil to his will reading thus:

"I, Jacob Kahan, do hereby make, publish and declare this Codicil to my last Will and Testament dated January 31, 1936, as follows:

"Article II of my said Will is hereby amended by adding thereto the following clause: His (my said brother, Calmen Cohen's) two eldest sons, if they shall have served in the armed forces of the Allied Nations in the present war, are to receive $500.00 each.

"Article VI, of my said Will and particularly as to subdivision 'C' thereof is hereby amended by adding thereto the following: In the event that neither my said brother, or his wife, are alive, or cannot be located within one year after this war, and furthermore, in the event Palestine met with misfortune through the present Nazi War campaign against it and has thus been ruined as a Jewish Settlement or Homeland, then all such proceeds of the within legacy are to go to the Bnai Brith of Los Angeles, California.

"All other provisions of my said Will are to remain in full force and effect."

[1, 2] This is the sole question necessary for us to determine:

Did the codicil to decedent's will modify his previous will so as to effect a revocation of the testamentary clause in question and effect a republication of the will?

This question must be answered in the negative and is governed by this statement of our Supreme Court in the Estate of Kaufman, 25 Cal.2d 854, 860, 155 P.2d 831, 834:

"When a testator repeats the same dispositive plan in a new will, revocation of the old one by the new is deemed inseparably related to and dependent upon the legal effectiveness of the new. (Citing cases.) If the new will fails to give effect to the twice declared purpose of the testator, its revocatory clause falls, for a testator who repeats his purpose intends to confirm and not revoke it, and does not intend to have the new will operate as a revocation independently of its operation as a will."

It is clear that decedent in the execution of the codicil to his will did not intend to revoke the previous charitable disposition made by his will of January 31, 1936, but did intend to confirm it; therefore under the rule announced by the Supreme Court in Estate of Kaufman, supra, the codicil did not constitute a revocation of the will and a republication thereof. Hence the charitable bequest was made more than six months before the death of the testator and the trial court erred in holding that the bequest should be reduced to one third of the net distributable estate.

For the foregoing reasons the order is reversed with directions to the trial court to make an order conforming with the views above expressed.

MOORE, P. J., and WILSON, J., concur.

BURNAND v. IRIGOYEN et al.*

Civ. 15248.

District Court of Appeal, Second District, Division 2, California.
Nov. 13, 1946.

Rehearing Denied Nov. 27, 1946.
Hearing Granted Jan. 10, 1947.

1. Appeal and error ⚿1071(6)
Trial ⚿397(1)

Where, in action tried to the court, it was alleged in cross-complaint that cross-complainant was under 18 years of age when contract for purchase of realty was executed and allegation was denied in answer to cross-complaint and evidence was introduced as to cross-complainant's age, age of cross-complainant at date of execution of contract was a material issue, and failure of trial court to make a finding as to age was prejudicial error.

2. Trial ⚿391

Where an action is tried before court without a jury, unless findings are waived, they are required on all material issues raised by the pleadings and evidence.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Clara Kuhrts Burnand against Juan J. Irigoyen to quiet title to certain realty subject to a conditional sales agreement wherein defendant Marie Antoinette Irigoyen and others cross-complained to recover certain sums paid under the conditional sales contract. The complaint was dismissed and the action was tried on the cross-complaint. From a judgment for plaintiff and cross-defendant, cross-complainants appeal.

Reversed.

Saul Ruskin, of Los Angeles, for appellants.

Albert W. Leeds, of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from a judgment in favor of respondent, after trial before the court without a jury, of issues raised by a cross-complaint filed by appellants and the answer thereto, in an action to recover sums of money paid under a conditional sales agreement.

The essential facts are these:

Respondent filed an action to quiet title to a residence and its furnishings located in Los Angeles alleging that on September 7, 1937, respondent and her then husband (they having been divorced prior to the present action) entered into a conditional sales agreement with appellants to sell the aforementioned property to them for the sum of $33,500; that the buyers had defaulted in payments due under the agreement and that respondent had acquired her former husband's interest in the property.

After the commencement of the action appellants served upon respondent notice that they disaffirmed the agreement for the reason that they had entered into the contract with respondent and her husband while they were minors.

Appellant Marie Antoinette Irigoyen answered the complaint and also through her guardian ad litem filed a cross-complaint seeking the return of money that had been paid under the contract on the ground that the contract was void because she was a minor at the time of its execution.

When the action was called for trial respondent waived any right to relief upon her complaint and proposed that the cause proceed to trial on the cross-complaint. Upon motion of appellants, consented to by respondent, the complaint was dismissed and a judgment of dismissal was ordered in favor of appellants. Thereafter the cause proceeded to trial on the cross-complaint of appellant Marie Antoinette Irigoyen and respondent's answer thereto. Evidence oral and documentary was introduced in behalf of said appellant. At the close of her case, respondent without offering evidence rested and the trial court thereafter entered a judgment in favor of respondent based upon findings which failed to make any finding as to said appellant's age at the time the contract was executed.

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* Subsequent opinion 186 P.2d 417.

This is the sole question necessary for us to determine:

[1] *Did the trial court commit prejudicial error in failing to make a finding as to the age of appellant Marie Antoinette Irigoyen at the time the contract of September 7, 1937 was executed?*

This question must be answered in the affirmative.

In the cross-complaint it was alleged that on September 7, 1937, the date the contract between the parties was executed, cross-complainant was under the age of 18 years. In the answer to the cross-complaint the foregoing allegation was denied by respondent. Hence one of the material issues in the case was the age of the cross-complainant on the date of the execution of the contract. Evidence thereon was introduced as to the age of the cross-complainant, but the trial court failed to make a finding as to her age.

[2] It is the settled law in California that where an action is tried before the court without a jury unless findings are waived they are required on *all* material issues raised by the pleadings and evidence. If in such a case the court renders judgment without making findings on *all* material issues the judgment must be reversed on appeal. (James v. Haley, 212 Cal. 142, 147, 297 P. 920. See also cases cited in 23 McKinney New Calif. Digest, [1933] p. 577, sec. 286; Powell v. Johnson, 50 Cal. App.2d 680, 683, 123 P.2d 875.)

In view of the foregoing rule it is clear that as the trial court failed to find upon a material issue raised by the pleadings relative to which evidence was received, such omission constitutes prejudicial error and the judgment must be reversed.

As a result of our conclusions it is unnecessary to consider other questions urged by appellants as grounds for reversal of the judgment.

For the foregoing reasons the judgment is reversed.

MOORE, P. J., and WILSON, J., concur.

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76 Cal.App.2d 728

McKEE v. McKEE.

Civ. 15264.

District Court of Appeal, Second District,
Division 1, California.
Nov. 8, 1946.
Rehearing Denied Nov. 22, 1946.
Hearing Denied Dec. 23, 1946.

1. Divorce 🔑303(1), 312

An application for a modification of an award of custody of minor child of divorced parents is addressed to trial court's discretion, and its discretion will not be disturbed on appeal unless record presents a clear case of an abuse of that discretion.

2. Divorce 🔑298(1)

The question of custody of minor child of divorced parents is to be determined solely from standpoint of the child.

3. Divorce 🔑303(2)

Courts have jurisdiction to modify previous orders regarding custody of minor children of divorced parents without a showing of changed circumstances.

4. Divorce 🔑303(2)

The "changed circumstances rule" authorizing modification of order regarding custody of minor children of divorced parents on changed circumstances is resorted to where court has originally determined that child should be in custody of one of the parents because of unfitness of the other to have such custody, and not cases where court found both parents to be fit and awarded them both custody.

See Words and Phrases, Permanent Edition, for all other definitions of "Changed Circumstances Rule".

5. Divorce 🔑303(2)

Trial court did not abuse its discretion in entering order changing custody of five year old child from divorced father to divorced mother, notwithstanding that there was no showing of any change of circumstances from time of entry of original order.

6. Divorce 🔑312

Judgment of reviewing court would not be substituted for that of trial judge on divorced mother's application for order changing custody of five year old child from divorced father to her in absence of clear showing of abuse of discretion, especially where both parties appeared as witnesses before trial judge and were examined and cross examined at length.

7. Divorce ⚷303(1)

Fact that divorced mother had instituted in another state an action assailing original California divorce proceeding and again seeking custody of minor child did not prevent her from thereafter seeking an order changing custody of child from divorced father to her.

WHITE, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action for divorce by Evelyn McKee against Mark T. McKee, wherein the defendant filed a cross-complaint. From an order determining custody of minor child of the parties, the defendant appeals.

Affirmed.

Joseph Scott, and A. H. Risse, both of Los Angeles (J. Howard Ziemann, of Los Angeles, of counsel), for appellant.

Jerome J. Mayo and F. Millar Cloud, both of Los Angeles, for respondent.

DORAN, Justice.

On September 18, 1941, the respondent wife filed an action for divorce, and thereafter an answer and cross-complaint was duly filed by the appellant husband. The trial of the issues involved therein took place between October 28, 1942, and November 20, 1942, before Judge Thurmond Clarke, and resulted in an interlocutory judgment of divorce awarding the custody of the minor child, Terry Alexander McKee, then aged about two years and four months, to the appellant father, with the provision that the child should "spend three months in the summer time with the plaintiff" mother, during which period the child was not to be taken out of the State of California without consent of the court. The appellant was ordered to pay the respondent $300 per month pursuant to a property settlement agreement, and an additional sum of $100 per month during the time the child was with the respondent. The trial court found that the father, to whom custody was granted, had "a well established, proper home in Milwaukee and also in Port Austin, Michigan," and that the father "is better able to provide for the proper raising and education of said minor child than the plaintiff." The court also found that the mother, respondent, had been guilty of indiscreet conduct with another man. From this judgment the mother instituted an appeal on March 2, 1943, but filed an abandonment of such appeal on May 21, 1943. On August 23, 1943, the mother sought a modification of the custody order, which modification was denied September 29, 1943, by Judge Stanley Mosk. Again, on September 12, 1944, Judge Mosk at another hearing, granted the father control of the child on designated Saturdays during September when the mother otherwise had custody, and reaffirmed the original order granting custody to the father during nine months of the year.

The record further discloses that on July 7, 1944, Evelyn McKee, the mother, filed in the Circuit Court of Milwaukee County, Wisconsin, a lengthy complaint seeking exclusive custody of the child; alleging that the Superior Court of Los Angeles County possessed no jurisdiction to enter the divorce judgment of November 20, 1942, for the reason that Mrs. McKee who had instituted such action and had averred a California residence, nevertheless had then possessed no such legal residence. The Wisconsin complaint farther assailed the integrity of the California judge who granted the original divorce judgment, of plaintiff's original attorneys, and of the defendant's attorney, charging collusion among them resulting in the judgment fixing custody of the child.

On May 24, 1945, the father, appellant herein, instituted in the Superior Court of Los Angeles County, an order to show cause, seeking complete custody of the child Terry, and during the hearing thereof, the mother was permitted to have issued a similar order to show cause also requesting the complete custody. The minute order of this hearing states that Judge Ruben Schmidt ordered "the custody of the child to be with the plaintiff (respondent, mother), with the right of reasonable visitation to the defendant." The formal order, set forth in a supplement to the appellant's brief, recites that the child "is now five (5) years of age and * * * has been kept (at Port Austin, Michigan) in a place not accessible, snowbound in winter, and subject to severe weather conditions"; that the defendant is frequently absent from home and that most of the time Terry had been under the care of aged employees; that the mother "has been deprived of the opportunity of visiting and caring for her child," and that the mother "is a fit and proper person to have the care, custody and control of said minor child." The present appeal is from this order changing custody from the father to the mother.

[1, 2] It is the appellant's contention that "there is absolutely no evidence of any change of circumstance and it was reversible error for the court to modify the original custodial order"; further that "The uncontradicted evidence proves conclusively that the original custodial order protects and serves the welfare and best interests of the minor child," and that there was "a clear case of abuse of judicial discretion" in modifying the original order. On behalf of respondent there is cited the case of Munson v. Munson, 27 Cal.2d 659, 166 P.2d 268, 272 wherein the court said, "It is settled that 'An application for a modification of an award of custody is addressed to the sound legal discretion of the trial court, and its discretion will not be disturbed on appeal unless the record presents a clear case of an abuse of that discretion (Citations.)' (Foster v. Foster, 1937, 8 Cal.2d 719, 730, 68 P.2d 719, 724.)" This decision further reiterates the fundamental rule that the question of custody "is to be determined solely from the standpoint of the child."

[3, 4] In support of appellant's contention that a clear abuse of discretion has occurred, there were cited in oral argument the cases of Kelly v. Kelly, 75 Cal.App.2d 408, 171 P.2d 95, and Dotsch v. Grimes, 75 Cal.App.2d 418, 171 P.2d 506. The law, as announced in these and other cases, coupled with the factual situation as presented in the record, makes it clearly apparent that no reversal should occur in the instant case, and that the custody should be left with the mother, as determined in the order herein appealed from. In the case of Kelly v. Kelly, just referred to, the court approved the statement in Peterson v. Peterson, 64 Cal.App.2d 631, 633, 149 P.2d 206. 208, that the rule of "changed circumstances" governing modification of custody orders "might well be termed a creature of judicial expediency. * * * However, that is not to say that the courts have no jurisdiction to modify previous orders in the absence of such a showing nor do the decisions wherein the (changed circumstances) rule is enunciated 'deny the power of the court to make such modification of its orders relative to the custody of children.' Bogardus v. Bogardus, 102 Cal. App. 503, 506, 283 P. 127, 128." Particularly applicable to the present situation is the following language found at page 415 of 75 Cal.App.2d, at page 99 of 171 P.2d of the Kelly case: "We are impressed that the 'changed circumstances' rule, which is not statutory, is resorted to in those cases where the court has originally determined that the child should be in the custody of one of the parents because of the unfitness of the other to have such custody, * * * and not to cases such as the instant one where the court found both parents to be fit, awarded them both custody * * *." In the present case, as commented on in respondent's brief, Judge Thurmond Clarke, who made the original custody order, must have decided that any "dereliction allegedly proven against respondent in the original divorce action," did not militate against granting custody to the mother during three months of the year.

[5] There is a similar holding in Dotsch v. Grimes, 75 Cal.App.2d 418, 171 P.2d 506, 507, decided the same day as the Kelly case, (July 18, 1946) where the court said: "If, as it has been repeatedly held, the welfare and best interest of the child are the paramount concern of the court, then what governs is not the rule of 'changed circumstances,' but what at the time of the hearing is, in the sound discretion of the court, for the child's welfare." In the Dotsch case it was held that the trial judge did not abuse discretion in modifying a custody

order so as to provide that the father should have custody for six weeks instead of three months. So in the present case it cannot be said that the final order granting custody to the mother for twelve months instead of three months as originally ordered, amounts to an abuse of discretion justifying reversal, particularly in view of the age of the child and the other circumstances which were before the court.

[6, 7] At the trial of the within action, both parties appeared as witnesses and were examined and cross-examined at length. It has been noted often in many decisions that the trial judge, having heard the evidence and observed the witnesses, is best qualified to pass upon and determine the issues there presented. And this is especially true where the custody of minor children is involved. It is well settled that the judgment of the reviewing court should not be substituted for that of the trial judge. Only upon a clear showing of abuse of discretion will such judgment be disturbed on appeal. There is no such showing in the instant case. Nor does the fact that the mother had instituted in another state, an action assailing the original California divorce proceeding, and again seeking custody of the child, in any manner affect the situation, however ill advised such action may have been.

The order appealed from, granting complete custody to the mother, respondent herein, is therefore affirmed.

YORK, P. J., concurs.

WHITE, Justice (dissenting).

I dissent.

I am in accord with the holding of the majority opinion that "The judgment of reviewing courts should not be substituted for that of the trial judge except upon a clear showing of abuse of discretion," but in my opinion the instant proceeding presents a case wherein the court clearly abused the discretion reposed in it in cases of this character involving custody of children, wherein the best interests and welfare of the child are the paramount issues. It is not the feelings and desires of the parents that are determinative, save and except in so far as they may justly be found to affect the best interests and welfare of the minor.

While in cases such as this the trial court is clothed with a wide discretion, such discretion is not plenary and unrestricted but is limited to what may be termed the exercise of a legal discretion, which while broad and inclusive, nevertheless is a legal discretion and must be exercised in consonance with fixed legal principles.

Judicial discretion is neither capricious nor arbitrary. As was said in Bailey v. Taaffe 29 Cal. 422, 424 "It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede the ends of substantial justice." The phrase "judicial discretion" implies the use of discriminating judgment within the bounds of reason and bridled by legal principles, the application of which will tend, in cases such as the instant one, to promote the good and welfare of the child.

In the light of what has just been said, let us proceed to a consideration of the record before us in the instant case. Therein is reflected the fact that respondent herself instituted the original action for divorce on September 18, 1941 in the Superior Court of Los Angeles County. After the cause was at issue, a trial thereof before Hon. Thurmond Clarke, Judge Presiding, resulted in a decree of divorce and the custody of the minor child of the parties being awarded to appellant herein, with the right of respondent to have the child for three summer months each year. In this proceeding the court made findings of fact which included the following:

"That it is true that during the month of May, 1941, plaintiff and cross-defendant told Charles Watt that she never wanted the baby Terry Alexander McKee to know his father.

"That it is true that during the month of May, 1941, plaintiff and cross-defendant advised Charles Watt that she was going to Peru with Max de la Fuente and take the baby, Terry Alexander McKee with them and that plaintiff and cross-defendant hoped to get her divorce soon so that she could get out of this Country.

"That it is true that in May, 1941, Max de la Fuente moved his clothes into the home of plaintiff and cross-defendant and stayed there constantly and lived there until September, 1941, occupying the room of defendant and cross-complainant.

"That it is true that plaintiff and cross-defendant was seen kissing Max de la Fuente on many occasions.

"That it is true that plaintiff and cross-defendant stated to Joan McKee that she loved Max de la Fuente and would always love him and that she hoped to marry him and to go to South America and take Terry Alexander McKee (the minor child herein) with them.

"That it is true that since the birth of Terry Alexander McKee, minor child of the parties hereto, Cynthia McKee, daughter of defendant and cross-complainant took care of him in general.

"That it is true that plaintiff and cross-defendant stated to Joan McKee that defendant and cross-complainant would never see Terry Alexander McKee again.

"That it is true that during the month of June, 1941, at the home of plaintiff and cross-defendant and defendant and cross-complainant, located at Azusa, California, the plaintiff and cross-defendant was seen in bed with one Max de la Fuente by Julian McKee a minor child of the defendant and cross-complainant; that at said time and place said Julian McKee brought tomato juice with Lea and Perrins sauce to the said plaintiff and cross-defendant and Max de la Fuente while they were in bed; that at said time and place said Max de la Fuente was a married man.

"That it is true that during the month of June, 1941, at the house of the plaintiff and cross-defendant and defendant and cross-complainant, located at Azusa, California, the plaintiff and cross-defendant was seen in bed with Max de la Fuente by Julian McKee, minor child of the defendant and cross-complainant.

"That it is true that during the Spring of 1941, at the house of the plaintiff and cross-defendant and defendant and cross-complainant, located at Azusa, California, the plaintiff and cross-defendant was seen in bed with Max de la Fuente by Muir McKee, a minor child of the defendant and cross-complainant.

"That it is true that during the month of June, 1941, at the house of the plaintiff and cross-defendant and defendant and cross-complainant, located at Azusa, California, the plaintiff and cross-defendant was seen in bed by Charles Watt; that at said time and place the minor child of the parties thereto, to wit, Terry Alexander McKee, was in the bed with the plaintiff and cross-defendant and Max de la Fuente."

The court also found that appellant herein "has a well-established proper home in Milwaukee, Wisconsin, and also in Port Austin, Michigan, and that defendant and cross-complainant (appellant) is able properly to care for said minor child at either of these two places, and that the defendant and cross-complainant is better able to provide for the proper raising and education of said minor child than the plaintiff and cross-defendant (respondent herein)."

On August 23, 1943, respondent caused an order to show cause to issue through which she sought to have that portion of the decree awarding custody of the minor child to appellant herein modified and the custody awarded to her. After a hearing had before Hon. Stanley Mosk, Judge Presiding, respondent's request for modification of custody was denied. On September 12, 1944, respondent's motion for modification of a restraining order was denied.

On July 7, 1944, respondent herein filed an action in the Circuit Court of Milwaukee County, Wisconsin, wherein she attacked the decree of divorce herein, denying that the Superior Court of Los Angeles County ever had jurisdiction, notwithstanding the fact that she herself instituted the original divorce proceeding here through the filing of her verified complaint, wherein, as well as in her verified first and second amended complaints, and as a witness at the trial, she insisted under oath that she was a resident of the county of Los Angeles. The question of jurisdiction was an issue and vigorously contested in the divorce trial. Appellant herein by his answer in the original divorce proceeding, denied respondent was a resident of Los Angeles County. At the trial, the court found that she was a resident of California and that appellant herein was a resident of the State of Michigan.

By her pleadings in the Wisconsin action, respondent herein bitterly attacked appellant, and with equal bitterness assailed the character, integrity and honor of the Judge of the Los Angeles County Superior Court who tried the divorce action, her original counsel, and counsel for appellant herein, charging that she was the victim of collusion, fraud and perjury.

In her Wisconsin action, respondent herein, notwithstanding her previous sworn statements in the California proceeding that she was a resident of this state and her testimony at the trial to the same effect, averred in her complaint that she "did not have a domicile or legal residence in the state of California within the meaning of section 128 of the Civil Code" of this state. This she excuses in her complaint filed in the Wisconsin court with the averment that when she took oath before the California court that she was a resident of that state she "assumed that the term 'a resident' as used therein referred to the fact that she had been physically present and dwelling in the state of California for one year before the commencement of the action * * *." In her Wisconsin action, respondent herein alleged on information and belief that "during the trial of said action or prior thereto, the exact date of which plaintiff does not have sufficient knowledge or information to form a belief, the defendant secretly entered into collusion with attorneys E. G. Haumesch and Lee A. Solomon for the purpose of defeating the rights of the plaintiff in said action, and plaintiff also alleges upon information and belief that during said trial or prior thereto, the exact date of which plaintiff does not have sufficient knowledge or information to form a belief, defendant secretly entered into collusion with the trial judge, Hon. Thurmond Clarke, for the purpose of defeating the rights of the plaintiff in said action, and that as a result of the collusion thus practiced by defendant the plaintiff's rights were defeated and said Hon. Thurmond Clarke decided said action against the plaintiff and entered judgment therein in favor of the defendant in form granting the defendant a divorce and awarding the custody of the minor child of the parties to the defendant for a period of nine (9) months each year"; that because of collusion between her husband and Judge Clarke she was awarded a sum totally inadequate to finance her appeal. In her Wisconsin action, respondent herein further alleged that Judge Clarke's finding that she was a resident of California was occasioned by the fact that "defendant (appellant herein) subjected Hon. Thurmond Clarke, the trial judge, to his domination and control and after having secured such domination and control the defendant prevailed upon said Hon. Thurmond Clarke as trial judge and caused him to make" the aforesaid finding.

In her Wisconsin action, respondent herein also alleged that appellant's attorney "caused said action to be assigned for trial before" Judge Clarke who had "secured his appointment as a Judge to the bench of said county through the efforts" of appellant's counsel, who it is alleged "is a person of much political influence in the County of Los Angeles." Respondent herein also alleged "that during the trial of said action, Honorable Thurmond Clarke frequently conferred concerning said case" with the son of her husband's counsel who is also a Judge of the Superior Court of Los Angeles County.

The proceedings which gave rise to this appeal were instituted by appellant on May 24, 1945, when he caused to be issued an order to show cause why he should not have complete custody of the minor child. In the order from which this appeal was taken, the court made findings as set forth in the majority opinion. Upon said findings, the court made the order as also set forth in the majority opinion, granting complete custody of the minor child to respondent herein with the right only of "reasonable visitation to the defendant."

During the hearing which resulted in the last-mentioned order, respondent herein was permitted to file an order to show cause why she should not be granted "full custody of her son, Terry Alexander McKee, subject to the right of reasonable visitation by the defendant * * *." The Wisconsin case was pending at the time of the hearing which occasioned this appeal. And it is apparent from the record that the Wisconsin case was dismissed only after considerable urging on the part of the trial judge herein. Respondent at first evaded the court's request for a direct answer, and the court permitted a recess so that she might consult with her attorney. After the recess, in answer to the court's question, "Are you going to continue your litigation in Wisconsin in view of the fact that this is the court that originally had the jurisdiction and still has the jurisdiction over the custody of that child?" coupled with the question by her own counsel as to whether she would "* * * refrain from asking the Wisconsin court in any ways to change or modify any of the decrees of the California courts in regard to that baby, either the custody or the possession or the support or anything else having to do with that child?" the respondent answered, "Well, I don't quite—but I think—yes." Again respondent stated, "I answer that I will comply with any orders that you make concerning the custody of the baby, but I feel that I have my day in court in Wisconsin." Subsequently, toward the termination of the hearing, the court asked respondent, "Are you planning to dismiss that action (in Wisconsin) irrespective of what decision I make here, Mrs. McKee?" to which respondent answered, "Your Honor, I believe you will make a decision for me."

To the interrogatories of the court, "irrespective of what decision I make here," and "you are going to dismiss your Wisconsin suit?" respondent finally answered, "I will, Your Honor."

This attempt at bargaining for a dismissal of the Wisconsin lawsuit, when considered in the light of the sworn testimony aforesaid as to residence, disregard of the jurisdiction of the California courts, assault upon the integrity of a judge thereof, and the evidence relied upon to support the order, in my opinion, justifies a reversal.

The only evidence before the court upon which findings are based is with reference to the accessibility of the appellant's home in Michigan, the inclemency of winter weather at Port Austin, Michigan, the claimed absence of appellant from the home from Monday to Friday each week, and the assertion that the minor is under the care of "elderly people," a man and wife of the age of 50 years and a cousin of appellant's first wife who is aged 60.

Without going into the conflict in the evidence, suffice it to say that it is noteworthy that there is no testimony of any change in the fitness of appellant to care for his son, while with reference to the health and well-being of the child I quote the statement of the trial judge in that regard as follows:

"That was gone into also, Mr. Scott, no question over the health of the child at the present time; no serious question during any of the time that it has been in his (appellant's) custody." With reference to educational facilities, while there is testimony that the nearest high school is 16 miles away, the minor child is only 5 years of age and is now attending kindergarten. The evidence is clear and uncontradicted that there is a "very good" elementary school within a mile of the home of appellant in which the child was being cared for, and that there is adequate transportation to take the child to school from his home and to return him thereto.

With reference to respondent's complaint that the minor child should have children of his own age to play with, the record herein shows without contradiction that some of the minor child's youthful relatives, seventeen in number, visit him and play with him, and for periods of time reside with him; and also, that the boys and girls of his Sunday School class come to his house for parties and he goes to their homes for parties.

With reference to respondent mother's ability to furnish a home for the child, the record reflects that she has none. Her Milwaukee apartment is not available, first, because she has sublet it, and secondly, it is to be noted that the original custody order and the order modifying custody (from which this appeal was taken) both command that respondent is to keep minor child in California during the periods of time she has custody. The only evidence of any place in California to which respondent can take the minor child is a house owned by a friend of hers "across the Golden Gate Bridge"; which house has four rooms. However, it already houses two adults and one child, to wit, respondent's friend and child, and respondent's stepdaughter. Were respondent to take up residence there with the minor child here involved, there would be three adult women and two children living in a four-room house. The record does not show that respondent has any other place in California, or in any other locality, to which she could take the minor child.

In the light of the foregoing, where, I ask, is there any evidence, substantial or otherwise, to support a finding that the best interests and welfare of the minor requires a change of custody such as was ordered herein? So far as the evidence goes, there is not one iota to indicate that the child did not have the best of care from his father.

All presumptions are in favor of the reasonableness of the original decree entered in this cause, and the burden was cast upon respondent herein to prove that new facts or circumstances had intervened, affecting the welfare of the child, before a modification of the original order in re custody would be justified. Johnson v. Johnson 72 Cal.App.2d 721, 723, 724, 165 P.2d 552. In a proceeding to modify an order for custody the court proceeds on new facts considered in connection with those formerly established. Crater v. Crater 135 Cal. 633, 634, 67 P. 1049. It is not the whims and caprices of the parties to a divorce action that is the controlling force in directing the custody of minor children, but the good and welfare of the child. Because of the presumptions attached to the original order vesting custody in appellant, he can not be deprived of such custody unless it be shown that he is so unfit, or that other circumstances have intervened which reasonably indicate that the child's welfare would be in danger unless an order was made for change of custody, and it must further be shown by clear and convincing evidence that the child's best interests and welfare will be directly enhanced or promoted by the change. Johnson v. Johnson, supra, 72 Cal. App.2d at pages 723, 724, 165 P.2d 552. Were the rule otherwise, it would inevitably lead to the child's life being constantly unsettled and disturbed by recurring changes of his custody, to say nothing of the foundation it would lay for interminable and vexatious litigation. The case at bar is utterly barren of testimony showing the presence of any fact or circumstance that was hidden from or undisclosed to the trial judge on the occasion when the original order was made. Munson v. Munson 27 Cal. 2d 659, 666, 166 P.2d 268.

What has here been said does no violence to the rule announced in Kelly v. Kelly, 75 Cal.App.2d 408, 171 P.2d 95; Dotsch v. Grimes, 75 Cal.App.2d 418, 171 P.2d 506 and other cases cited in the majority opinion, all of which hold that, in the final analysis, while a showing of "changed circumstances" is not an essential prerequisite to the making of a modification order in re custody of a minor child, the legal discretion vested in the court must be exercised upon evidence from which it appears that the best interests and welfare of the child would be conserved by any action taken, either denying or granting a change of custody. In other words, while the trial judge is clothed with a wide discretion, that discretion is, as heretofore noted, not unbridled but is limited by the rules of law herein enunciated.

Under the facts present in the instant proceeding and the law applicable thereto, I am persuaded that the trial court abused its discretion in modifying the original order in the absence of any "changed conditions"; appellant's unfitness, or that the best interests and welfare of the child would be enhanced or promoted.

The order should therefore be reversed.

FREEMAN et al. v. CHURCHILL et al.*

Civ. 15332.

District Court of Appeal, Second District,
Division 2, California.

Nov. 13, 1946.

As Modified on Denial of Rehearing
Nov. 26, 1946.
Hearing Granted Jan. 10, 1947.

1. Appeal and error 🔑930(1)

On appeal the evidence is viewed in the light most favorable to the respondents.

2. Automobiles 🔑245(44)

Whether defendant, who collided with automobile in traffic-controlled intersection, was negligent in driving a four-ton truck filled with 8.7 tons of hot asphalt and traveling about 20 miles per hour into intersection when traffic-controlled signal showed "caution", was for jury. Vehicle Code, § 476(b)1.

3. Automobiles 🔑244(35)

Evidence sustained finding that defendant, who collided with plaintiff's automobile in intersection, could not have stopped with safety before entering intersection and was not negligent in driving a four-ton truck filled with 8.7 tons of hot asphalt and traveling about 20 miles per hour into intersection when traffic-controlled signal showed "caution". Vehicle Code, § 476(b)1.

4. Appeal and error 🔑882(12)

Appellate court would not consider alleged error in giving an instruction where similar instruction was given at request of appellants.

5. Trial 🔑234(1)

In action for injuries arising out of automobile collision, instruction precluding consideration of fact that a criminal action had arisen out of the collision, and stating that the criminal action had only been referred to because statements made by persons who testified previously could be shown on cross-examination to test the accuracy of testimony given by them in civil trial, was a correct statement of the law and was not erroneous on the ground that instruction limited jury in considering statements made by defendant at criminal trial contrary to statements made at civil trial to impeachment purposes only, and could not be considered as admissions against interest.

6. Appeal and error 🔑216(2)

Appellants could not urge error in instruction that was correct insofar as it stated the law, where appellants had failed to request further instructions on the subject.

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Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Carl J. Freeman and Winifred M. Freeman against Dale Churchill, C. O. Sparks, Mundo Engineering Company, a corporation, and others, for injuries resulting from an automobile accident. From a judgment in favor of defendants after a trial before a jury, plaintiffs appeal.

Judgment affirmed.

Russell H. Pray, of Long Beach, and Pierson & Block, of Los Angeles, for appellants.

Spray, Davis & Gould, and Parker, Stanbury & Reese, by Raymond G. Stanbury, all of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before a jury in an action to recover damages for injuries resulting from an automobile accident, plaintiffs appeal.

[1] The evidence being viewed in the light most favorable to the defendants (respondents) and pursuant to the rules set forth in Re Estate of Isenberg, 63 Cal.App.2d 214, 216 et seq., 146 P.2d 424, the essential facts are:

On June 5, 1944, at about four o'clock in the afternoon, defendant Churchill was driving a truck filled with hot asphalt which he was transporting from a plant of his codefendant to the Long Beach Municipal Airport, in a southerly direction on Atlantic Boulevard just north of its intersection with Olive Street. Plaintiff Mrs. Freeman, at the same time was driving an automobile, owned by herself and her husband, in an easterly direction on Olive Street just west of the same intersection. The intersection was controlled by electric traffic signals. Defendant Churchill drove his truck into the intersection when the "caution" signal was displayed for traffic traveling north or south on Atlantic Boulevard. At the instant the "go" signal appeared for traffic traveling west or east on Olive Street Mrs. Freeman drove her car into the intersection. The two cars collided with resulting serious injuries to Mrs. Freeman and her three year old daughter who was riding with her. The latter died from the injuries.

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* Subsequent opinion 183 P.2d 4.

Mrs. Freeman admitted that at the time of the accident and immediately prior thereto she had an unobstructed view of the intersection and the approach thereto for at least half a mile. She further testified that she did not see the truck until it was within about five feet of her car.

There are two questions necessary for us to determine:

First: *Was there substantial evidence to sustain the trial jury's implied finding that defendant Churchill was not negligent in the operation of his truck?*

This question must be answered in the affirmative and is governed by this pertinent rule of law:

Vehicular traffic facing a "caution" signal at an official traffic controlled intersection should stop before entering the nearest cross-road at the intersection or a marked line unless such stop cannot be made in safety, in which event a vehicle may be driven cautiously through the intersection or past such signal. (Vehicle Code, sec. 476(b)-1.)

It is unnecessary to cite authorities in support of the proposition that negligence on the part of defendant is a question of fact for determination by the trial jury from all of the evidence in the case, and that its finding will not be disturbed by an appellate court if there is substantial evidence in support thereof.

[2, 3] Defendant Churchill testified that at the time he entered the intersection the traffic controlled signal showed "caution" for traffic traveling in a southerly or northerly direction on Atlantic Boulevard. The evidence further discloses that the truck he was driving weighed four tons, was filled with 8.7 tons of hot asphalt and was traveling about 20 miles per hour. Therefore it was a question of fact for the trial jury to determine whether defendant could have with safety stopped his truck before entering the intersection; and the implied finding that he could not do so and that he proceeded with caution into the intersection thus finds support in the evidence and such action on his part was permissible in view of the rule stated in the section of the Vehicle Code, mentioned supra. Hence the implied finding of the jury that defendant Churchill was not negligent in the operation of his truck being supported by the evidence is binding upon this court.

Second: *Did the trial court commit prejudicial error in instructing the jury at the request of defendant Churchill as follows:*

[4] 1) *"You are instructed that both drivers, the defendant Mr. Churchill and the plaintiff Mrs. Freeman were required to exercise ordinary care. The same degree of care was required of each of them. Each was required to maintain a reasonable lookout for other traffic lawfully using the highways, as such lookout would have been maintained by persons of ordinary prudence in their positions. Neither of them had the right to assume that the way was clear, if the facts were such that persons of ordinary prudence so situated would not so have assumed."*

This court will not consider any alleged error in the giving of such instruction for the reason that a similar instruction was given at the request of the plaintiffs which reads as follows:

"It is the duty of every person using a public highway, whether a pedestrian or the driver or operator of any kind of vehicle, to exercise ordinary care at all times to avoid placing himself or others in danger and to avoid a collision."

The rule is clearly established that an appellant may not urge error in an instruction when at his own request a similar instruction is given by the trial court.

2) *"You are instructed that the fact that there was a criminal action arising out of this accident has no bearing whatever upon this trial. A criminal trial does not decide any issue which you are called upon to decide in this case. Therefore, the fact that there was a criminal prosecution should not enter into your deliberations in this case for any purpose whatever. It has been material to refer to it in this trial only because statements made by persons who testified previously may be shown on cross-examination to test the accuracy of testimony given by them in this trial."*

[5, 6] The foregoing instruction was a correct statement of law and plaintiff's criticism, that it limited the jury in considering statements made by defendant Churchill at the criminal trial contrary to statements made at the instant trial to impeachment purposes only is without merit. There is nothing in the instruction which says that previous inconsistent statements of such defendant could not be considered as admissions against his interest. Furthermore had plaintiffs desired a further instruction on the subject it was their duty to request it and having failed to do so they may not now urge error in the instruction that was correct insofar as it stated the law. (Peri v. L. A. Junction Ry., 22 Cal. 2d 111, 129, 137 P.2d 441; Blanchard v. Norton, 49 Cal.App.2d 730, 734, 122 P.2d 349.)

In view of our conclusion that the jury was justified in finding that defendant Churchill was not negligent, it is unnecessary to consider the alleged errors of the trial court in (1) instructing the jury on the doctrine of contributory negligence, or (2) directing a verdict in favor of said defendant's alleged employer, C. O. Sparks, Mundo Engineering Company.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

ANDERSON v. ATCHISON, T. & S. F. RY. CO.*

Civ. 15500.

District Court of Appeal, Second District, Division 2, California.

Nov. 13, 1946.

Hearing Granted Jan. 10, 1947.

1. Master and servant ⚿92(1)

A railroad having notice of absence of an employee from a moving train is under no duty to use ordinary care to ascertain his whereabouts and render aid.

2. Master and servant ⚿92(1)

An employer is not liable for failure to discover whereabouts of a missing injured employee when employer has no knowledge that employee is injured or that there has been an accident.

3. Master and servant ⚿258(1)

In suit against railroad for death of conductor, complaint, alleging that conductor was thrown from train because rear vestibule door and fastener were defective, that no search was made for him, and that, by reason of delay in searching for and discovering him he was exposed to inclement weather and died about five hours after falling from train, failed to state a cause of action, in absence of allegation that railroad or its servants had any knowledge of conductor's helpless condition until he was finally discovered.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Suit by Doris Anderson, administratrix of the estate of L. C. Bristow, deceased, against the Atchison, Topeka & Santa Fe Railway Company to recover damages for the death of plaintiff's intestate, who was a conductor on one of the defendant's trains and was injured in a fall from the train. Judgment for the defendant, and the plaintiff appeals.

Judgment affirmed.

Hildebrand, Bills & McLeod, of Los Angeles, for appellant.

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* Subsequent opinion 187 P.2d 729.

Jennings & Belcher, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant predicated upon the sustaining of its objection to the introduction of any evidence on the ground that the complaint failed to state a cause of action in a suit to recover damages for the death of plaintiff's intestate, plaintiff appeals.

The gist of the complaint as amended * is that the decedent, plaintiff's intestate, who was a conductor upon a train of the defendant, fell from the train and that at some subsequent time, unstated, his absence was noted and no search was made for him for a further period of time and that by reason of the delay in searching for and discovering him he was exposed to inclement weather and as a result died.

Plaintiff concedes that this is the sole question presented for our determination:

Is a railroad that has notice of the absence of an employee from a moving train under a duty to use ordinary care to ascertain his whereabouts and render aid?

[1, 2] This question must be answered in the negative. It is the rule, supported by well considered decisions of other jurisdictions, that there is no legal liability upon the part of an employer for failure to discover the whereabouts of a missing employee when the employer has no knowledge that the employee is injured or that there has been an accident. (Haggard v. Lowden, 156 Kan. 522, 134 P.2d 676, 680; Batton v. Atlantic Coast Line R. Co., 210 N.C. 756, 188 S.E. 383, 388.)

In each of the cases cited the precise issue presented in the present case was raised and decided in conformity with the rule above announced.

Haggard v. Lowden, 156 Kan. 522, 134 P. 2d 676, reached the appellate court on a judgment for defendant entered after the sustaining of a demurrer to plaintiff's complaint. To that extent the Haggard case and the case at bar are identical, for here the appeal is from a judgment entered after the sustaining of an objection to the admission of any evidence on the ground that the complaint failed to state a cause of action. The Haggard case was also by an administratrix to recover damages for the death of her intestate upon the ground that the defendant through its agents neglected for several hours to make a search for the injured employee after his absence from the train was known, and also upon the claim that through this delay he was left unaided and died. Prior to his injuries, Kansas had adopted the rule of liability on the part of a master to furnish aid in an emergency to an injured or helpless employee when the master has knowledge thereof. The facts alleged were as follows:

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* Omitting the title of the court and cause, the material allegations of the complaint are as follows:

"V. That on or about the 24th day of November, 1942, at or about the hour of 5:30 o'clock A. M. thereof, said L. C. Bristow was employed by defendant as a conductor working on defendant's passenger train No. 1 then and there westbound from Amarillo, Texas, to Belen, New Mexico at a point approximately opposite defendant's station at Gallaher, Curry County, New Mexico.

"VI. That at said time and place in the regular course and scope of his employment by defendant, as aforesaid, said L. C. Bristow was required to engage in and he was engaged in checking a certain train order signal at said station and while performing said duty in the usual and ordinary manner, it was necessary for him to open the rear vestibule door of said train; that at said time and place defendant, acting by and through its agents, servants and employees, other than decedent, carelessly and negligently maintained said rear vestibule door and the fastener for said door in a defective and unsafe condition and as a direct and proximate result of such carelessness and negligence and while decedent was in the act of observing said order signal, said door was caused to suddenly release from its fastener and swing violently against decedent thereby causing said decedent to be thrown from said train and to sustain the injuries which resulted in his death on the 27th day of November, 1942, at or about the hour of 10:35 o'clock A. M. thereof.

"VII. That said accident and the injuries to said decedent, L. C. Bristow, as hereinbefore alleged, occurred on November 24th, 1942, at or about the hour of 5:30 o'clock A. M. thereof, and said L. C. Bristow died as a direct and proximate result of said injuries on November 27th, 1942, at or about the hour of 10:35 o'clock A. M. thereof, and between the time of his accident and the time of his death, said L. C. Bristow was conscious and suffered excruciating pain and mental anguish, all to plaintiff's damage in the sum of Ten Thousand ($10,000.00) Dollars.

"VIII. That at the time of his death, said L. C. Bristow left surviving him as his heirs at law, his widow Virla E. Bristow and his son, Dan Bristow, age fourteen years; and that said Virla E. Bristow and Dan Bristow were entirely dependent upon said decedent for their maintenance and support."

The deceased Haggard was a conductor in charge of a certain freight train. At the railroad yards at Topeka, the entire train crew except Haggard went to the railroad eating house for a meal. Shortly thereafter the train crew returned and negligently and without authority proceeded with the train, minus Haggard, the conductor, in violation of certain rules of the company. Haggard had been assaulted by some unknown person and, when the train left, was lying helpless on the railroad right-of-way for several hours unable to aid himself or to secure medical attention. The train crew continued the run without due regard for Haggard's welfare and without knowing where he was or what had happened to him, or without making any attempt to locate him and determine his condition. The train crew failed to see Haggard at his accustomed place upon the train and did not exercise the ordinary care of a prudent person in determining his whereabouts. His loss of blood, exposure and lack of medical care directly and proximately caused his death, which would have been averted if the servants and employees of defendant had promptly and seasonably located him and rendered aid, or had immediately reported his absence so that he could have been promptly treated. The direct and proximate cause of his death was due to these acts of omission and commission by defendants and their servants. A demurrer to the petition was sustained and plaintiff appealed. The court says 134 P.2d at page 678 et seq.:

"It is made clear by appellant's brief that she does not claim defendants or any of their employees caused or contributed to Haggard's injuries. She does contend that the injuries, in and of themselves, were not sufficient to have produced his death, but that such a result followed from his being left unaided and exposed for about two hours, due to the allegedly negligent failure of the defendants and their servants and employees to discover him and render him aid. The questions presented by the appellant may be summarized as follows:

"Where a conductor in interstate commerce is seriously injured from an unknown cause, while performing his duties at a stopping point, and under circumstances where he could have been found and his death prevented by the exercise of care by other members of the train crew, does their failure to so discover him constitute actionable negligence under the federal employers' liability act; and, under such circumstances, where the other trainmen, in alleged violation of company rules, started the train without making any effort to locate the injured conductor, and without discovering his predicament or reporting his absence, thereby delaying securing of medical care until too late to prevent his death which would not have otherwise occurred, does the violation of the rules constitute actionable negligence under the above act?"

The court refers to the fact that there can be no liability under the federal liability act without negligence, and that such negligence must be the cause of the injuries or death. The court says, 134 P.2d at page 679:

"It is clear from the petition, and as is noted above it is conceded by the appellant, that the original injury sustained by Haggard was not occasioned by nor due to any negligence of the appellee. The substance of appellant's contentions is that appellees owed a duty to render aid to an injured employee, regardless of the cause of his injury; that the violation by their employees of company rules was the legal cause of Haggard's injuries not being sooner discovered so that aid could have been rendered, and that it was not necessary to liability that appellees have actual knowledge of Haggard's injuries at the time they were received by him.

"Without exposition, we think it may be said the appellees would be liable, both under the law and under the company's rules, for failure to render aid, adequate under the circumstances, to an employee injured in the course of his employment, from the time they had actual knowledge of the injuries. We need not pursue this rule further for under the allegations of the petition it cannot be said the appellees had such knowledge. On the contrary the allegations are that after Haggard received his injuries, through appellees' negligence he was not found and was permitted to be unaided and without attention, his death resulting from his exposure and lack of medical care. * * * Appellant contends that in order for the company to be liable for negligence, it was not necessary the train crew have actual knowledge that Haggard had been injured, and that the appellees' contention that duty to extend care and aid did not arise until their employees knew of the injuries is too narrow, and that if the train crew knew or should have known that Haggard was in a position of danger, there was negligence in failure to assist him. In support of her contention, appellant does not cite any authority specifically in point, but she directs our attention largely to decisions dealing with injuries sustained in switching cases. The only decision of the court cited is McMullen v. Atchison, T. & S. F. Railway Co., 107 Kan. 274, 191 P. 306, and it is clearly distinguishable on the facts. Appellant also quotes excerpts from Pullman Co. v. Montimore, 5 Cir., 17 F.2d 2, but from an examination of that case it appears a porter who claimed damages from exposure, was left to guard a car placed on a siding by the company, and that the company was aware of the circumstances which led to the exposure. None of the cases cited support the contention that under circumstances similar to those here involved, notice of the injury is not necessary.

"Appellees direct our attention to many decisions, some rather closely in point, and some from which an analogy may be drawn that, under the circumstances, actual knowledge is required. Among these decisions is Batton v. Atlantic Coast Line R. Co., 210 N.C. 756, 188 S.E. 383, which involved the sufficiency of a petition to state a cause of action."

The court then notes several authorities including Batton v. Atlantic Coast Line R. Co., 210 N.C. 756, 188 S.E. 383, which decides generally that actual knowledge by the employer is necessary before there can be any legal duty resting upon an employer to seek for or render aid to an injured employee, and says 134 P.2d at page 681:

"We are of opinion that, under the circumstances of this case, the company was not negligent in not extending aid to its injured employee, when it was not aware of such injuries."

We call attention to the great similarity of the allegations in the complaint there and in the complaint in the case at bar. The allegations there were even more favorable to the plaintiff's contention than here; there it was alleged that rules of the company were violated (whereas there are no such allegations here) and that Haggard was a "conductor being in charge of the train." There is no such allegation here. While it appears decedent was a conductor, there was another employee who was "the regular conductor."

The other case involving the precise question at issue here is that of Batton v. Atlantic Coast Line R. Co., 210 N.C. 756, 188 S.E. 383. That case also was an appeal from a judgment rendered after sustaining a demurrer to a second count of the complaint complaining of delay in searching for and of failing to render aid to plaintiff, an injured servant. Like the Haggard case it also arose in a state where a legal duty is held to exist requiring an employer to render medical services in an emergency where the employer knows of his servant's injuries and of his helpless condition. The complaint did not allege any knowledge in the employer of the accident or injuries. As will be seen from the following statement of the facts they went much farther than in the case at bar: It was alleged that the plaintiff, a flagman on a passenger train, went to the rear of the train to protect it while it was stopped at a station. The night was dark and he stepped off the end of a platform and fell a distance of sixty feet where he remained until the next morning suffering from pain and exposure; that the defendant was negligent in not making search for him and in failing to render prompt medical attention. It was his duty, as flagman, to give a signal to the engineer at every stop, and without such signal the engineer started the train from Weldon, where the accident occurred, in violation of instructions and custom; that even after the train left the station his absence should have been discovered by other members of the train crew as they were required, and their instructions were, to get his signals at each stop, and in the absence of such signals they should have known he was missing and should have taken prompt steps to discover his whereabouts; that by reason of the negligent delay he was not found for over five hours whereby his injuries were aggravated. The judgment of the trial court in dismissing the second cause of action in the complaint (negligence in failing to discover the plaintiff and render him aid) was affirmed. The court said, 134 P.2d at page 680:

"In the instant case, it is not alleged in the complaint that any of the employees of the defendant was present at the time the plaintiff fell from the platform at Weldon, or that the defendant had actual knowledge of the condition of the plaintiff as the result of his fall. Nor are facts alleged in the complaint from which it can be held that the defendant had constructive knowledge of such condition. At most, the defendant knew when and after its train left Weldon that the plaintiff, while engaged in the performance of his duties as a flagman on said train had disappeared from the platform and had not returned to the train. This knowledge did not impose upon the defendant or any of its employees the duty to make an investigation to discover the cause of plaintiff's disappearance from the platform or failure to return to the train. The plaintiff may have disappeared from the platform and failed to return to the train, while it was standing at the station at Weldon, voluntarily. No facts are alleged in the complaint which imposed upon the defendant or its employees the duty to presume to the contrary."

[3] Examining the allegations of appellant's complaint in the instant case in the light of the foregoing authorities, it appears at once that the allegations of the complaints in the cited cases are more strongly in favor of the plaintiff than are those in the case at bar. In each of them it was held that the complaint did not state a cause of action for the reason that knowledge of the injuries and of the helpless condition of the injured man is a requisite under any line of decisions before liability can be visited upon the employer for failing to render aid or to make a search for him.

Since there is no allegation in the present complaint that the defendant or its servants ever had knowledge of the accident and injuries or of decedent's helpless condition until he was finally discovered at some later time, the complaint was fatally defective in that it failed to contain a material allegation and thus did not state a cause of action. Therefore the trial judge properly sustained defendant's objection to the introduction of any evidence.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

76 Cal.App.2d 739

PEOPLE v. GOLDEN.

Cr. 3991.

District Court of Appeal, Second District, Division 2, California.

Nov. 13, 1946.

Hearing Denied Dec. 12, 1946.

1. Weapons ⇨17(4)

Evidence of defendant's possession of a "monkey fist," consisting of a weight attached to end of heaving line to be thrown from ship to dock, was insufficient to sustain conviction of violating Dangerous Weapons Control Law. Gen.Laws, Act 1970, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Monkey Fist".

2. Criminal law ⇨1023(12)

An order in arrest of judgment is nonappealable.

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Felton Golden was convicted of violating the Dangerous Weapons Control Law, and he appeals.

Reversed.

Robert W. Kenny, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

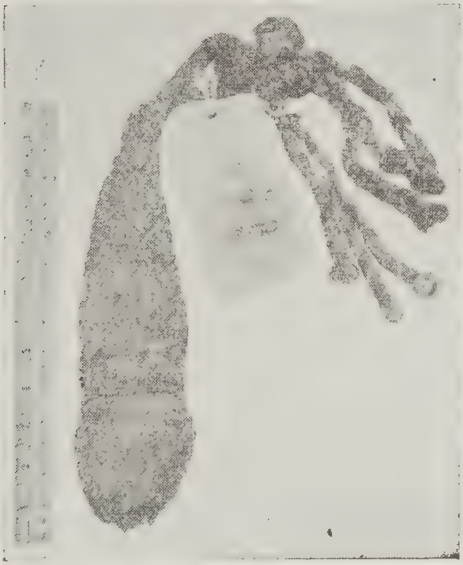
George Shibley, of Long Beach, for appellant.

McCOMB, Justice.

From a judgment of guilty of violating the Dangerous Weapons' Control Law of 1923, Section 1, Act 1970 of Deering's General Laws as amended, after trial before the court without a jury, defendant appeals. Defendant also appeals from the order denying his motion for a new trial. There is likewise a purported appeal from the order denying defendant's motion in arrest of judgment.

The evidence being viewed in the light most favorable to the People (respondent), the essential facts are:

On August 13, 1945, about 1:15 a. m., defendant was stopped by two police officers while driving his automobile between Second and Third streets on Beacon Street in Los Angeles. The police searched the car and discovered under the seat a "monkey fist", a photograph of which is attached hereto, marked People's Exhibit A. At the time of the trial an expert witness, Mr. Flinker, an able-bodied seaman, identified People's Exhibit A as a "monkey fist", an object used at the end of a heaving line. It is a weight attached to the end of a line so that when a line is heaved or thrown it will reach the dock. He testified that People's Exhibit A was a standard "monkey fist".



Defendant testified that he had found People's Exhibit A in Banning Homes, and not knowing what the object was he had picked it up and placed it in his automobile. There was no other evidence as to the nature of the exhibit.

[1] This is the sole question presented for our determination:

Was there substantial evidence to sustain defendant's conviction of violating the Dangerous Weapons Control Law of 1923, supra?

This question must be answered in the negative. Section 1 of Act 1970, Dangerous Weapons Control Law, reads in part as follows:

"On and after the date upon which this act takes effect, every person who within the State of California * * * possesses any instrument or weapon of the kind commonly known as a black-jack, slungshot, billy, sand-club, sandbag, or metal knuckles, * * * shall be guilty of a felony * * *."

It is evident from a reading of the foregoing statute that the possession of a "monkey fist" is not made illegal by such act nor is a "monkey fist" commonly known as a black-jack, slungshot, billy, sand-club, sandbag or metal knuckle. Hence it is clear that there is a total absence of any evidence to sustain defendant's conviction of a violation of the aforementioned law.

[2] For the foregoing reasons the judgment and order denying defendant's motion for a new trial are and each is reversed. An order in arrest of judgment is non-appealable. People v. Okada, 14 Cal.App.2d 660, 664, 58 P.2d 967. Therefore the attempted appeal therefrom is dismissed.

MOORE, P. J., and WILSON, J., concur.

76 Cal.App.2d 772

STERN et al. v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

No. 13333.

District Court of Appeal, First District, Division 2, California.

Nov. 15, 1946.

1. Searches and seizures 🔑5

An affidavit for warrant to search safety deposit box standing in name of man and woman to procure certain records in possession of person accused of performing abortions, was sufficient evidence of title and beneficial interest of man and woman and accused to entitle them to restoration of currency taken from box and not described in affidavit, in view of statutory presumption of ownership flowing from possession, whether or not man and woman were related to accused. Pen.Code, §§ 274, 1525, 1540; Code Civ.Proc. §§ 1086, 1963, subd. 11; Const. art. 1, § 19.

2. Mandamus 🔑3(2)

Petitioners for mandamus to compel Superior Court and judge and magistrate to restore currency seized under search warrant issued in criminal proceeding did not have plain, speedy and adequate remedy at law, since they could not sue the Superior Court or a judge thereof, and any action against county clerk would be met with defense that money was in custodia legis. Pen.Code, § 1540.

3. Mandamus 🔑154(3)

In mandamus proceeding to compel Superior Court and judge thereof and magistrate to restore currency seized under search warrant, respondents could not assert that petition was uncertain as to who had possession, custody or control of currency, in view of rule that defendants having knowledge of facts cannot assert uncertainty. Pen.Code, § 1540.

4. Mandamus 🔑15

In mandumus proceeding to compel Superior Court and judge and magistrate to restore currency seized under search warrant issued in criminal proceeding, judge could not assert impossibility of restoring the currency because money had been out of his possession, custody and control since named date, where judge had thereafter signed order making the money available for use as evidence in the criminal proceeding. Pen.Code, § 1540.

5. Mandamus 🔑14(2)

In mandamus proceeding to compel Superior Court and judge thereof and magistrate to restore currency seized under search warrant, a motion for return of property was a sufficient demand for the restoration of the currency. Pen.Code, § 1540.

6. Searches and seizures 🔑5

The desire of the people to use illegally obtained evidence in pending criminal proceeding did not warrant refusal to restore such evidence. Pen.Code, § 1540.

7. Searches and seizures 🔑7(1)

The fact that evidence illegally obtained can be admitted in evidence does not justify a court in abusing its own process to secure the production of evidence in plain violation of the constitutional and statutory guarantees against illegal searches and seizures. Pen.Code, §§ 1525, 1540; Const. art. 1, § 19.

8. Searches and seizures 🔑5

The right to restoration of property illegally seized did not depend on use to which such property would be put. Pen. Code, § 1540.

9. Searches and seizures 🔑5

The statute relating to restoration to citizen of property improperly taken under search warrant does not put burden on citizen of suing to get the property back, but makes it the mandatory duty of the magistrate to see to the restoration. Pen.Code, § 1540.

10. Searches and seizures 🔑5

Magistrate had duty to return currency taken under search warrant, where affidavit for warrant did not mention or describe the currency as such or by using the words "other evidence". Pen.Code, §§ 1524, 1525, 1540; Const. art. 1, § 19.

Mandamus proceeding by Samuel M. Stern, Daniel Reid and Katherine Reid against the Superior Court of the State of California, in and for the County of Alameda, S. Victor Wagler as judge thereof, and as a magistrate, to compel the respondents to order the return to petitioners of $50,000 in currency seized under a search-warrant issued in a criminal proceeding pending in the respondent Superior Court.

Peremptory writ issued.

Lewis F. Lercara, of Oakland, and Leslie C. Gillen, of San Francisco, for petitioners.

Ralph E. Hoyt, Dist. Atty., Folger Emerson, Asst. Dist. Atty., and Cecil Mosbacher, Deputy Dist. Atty., all of Oakland, for respondents.

GOODELL, Justice.

The petitioners seek a writ of mandate to compel the respondents to order the return to petitioners of $50,000 in currency seized under a search warrant issued in a criminal proceeding pending in the respondent Superior Court. An alternative writ was issued, returnable on November 12, 1946, and the matter was heard on that day and the next, and submitted.

On August 23, 1946, a lieutenant of the Oakland Police Department made an affidavit for a search warrant wherein he deposed that on August 20, 1946, Samuel M. Stern and Maurice F. Stock had performed an abortion on each of two women, naming them, in violation of section 274 of the Penal Code, and in which affidavit he stated generally the means used. He further deposed that he had just, probable and reasonable cause to believe that there were then in the possession of Stern and Stock in safe deposit box 3076 in the Central Bank in Oakland, (said box standing in the names of Daniel and Katherine Reid) "certain articles records and property which were used as a means of committing said offense; that said articles, records and property will be needed as evidence in the prosecution of said offense", and that they were "described particularly as follows, to wit: certain records, reports, day books, diaries, account books, correspondence, memoranda or other evidence and any and all other writings to, from, concerning or containing reference to the said [two women] and to any other person or persons upon whom the said Samuel M. Stern and the said Maurice F. Stock did procure, or attempt to procure a miscarriage, * * *." The affidavit also contained statements relating to the means of committing the alleged abortions, not material here, to "establish the existence of grounds for the issuance of a search warrant" and it prayed "that a search-warrant issue commanding that an immediate search be made of the * * * safety deposit box described herein, for the articles, records and property above described and that the same be brought before a magistrate and disposed of according to law."

On the same day a search warrant was issued by Hon. S. Victor Wagler, as Judge of the Superior Court, reciting the filing and contents of the affidavit, and continuing:

"That there were used by the said Samuel M. Stern and Maurice F. Stock, and that it is intended that there be used as a means of committing said abortions, the following described articles and property: Certain medical certificates, records and correspondence pertaining to said medical certificates, in the name of Samuel M. Stern and Maurice F. Stock, certain records, reports, day books, diaries, account books, correspondence, memoranda, other evidence, and other writings to or from, concerning or containing a reference to the said [two women, naming them] and other persons upon whom said abortions were performed.

"That there is just, probable and reasonable cause to believe that the above articles and property are now concealed in a safety deposit box, commonly known as Box No. 3076, in the name of Daniel Reid and Katherine Reid in the Central Bank" and in another safe deposit box not material here.

The warrant commanded any sheriff, constable, marshal or policeman "to make immediate search of the safety deposit boxes hereinabove described for the said articles and property, and if you find the same or any part thereof to bring it forthwith before me for disposition according to law."

A return was made by the lieutenant of police showing that on August 23 he searched box 3076 (standing in the names of Daniel and Katherine Reid) and discovered and took therefrom the following property:

"Item 1: Fifty Thousand Dollars ($50,000.00) in lawful money of the United States of America", consisting of 99 $10. bills; 1,273 $20 bills; 185 $50 bills; 138 $100 bills, and 1 $500 bill.

"Item 2: Five currency wrappers bearing figures and marks in ink.

"Item 3: Twenty-two white paper envelopes bearing figures and writing in pencil and ink."

On August 30 the District Attorney of Alameda County filed an affidavit with the Superior Court showing that he was prosecuting an action entitled People v. Samuel Stern, Maurice F. Stock and five other defendants under indictment for violations of section 274, and was assisting the grand jury in the investigation of Stern and others, and that in the prosecution of said action and in order to properly present the matter before the grand jury he should have access to the property seized pursuant to the search warrant, namely the $50,000 already described, the 5 wrappers and the 22 envelopes, all of which property he deposed "is now in the possession of the above-entitled court". The affidavit prayed for an order that said property be delivered to the District Attorney in his official capacity "to be used as evidence in the above-mentioned criminal action and in the above-mentioned matter and in any further proceedings arising therefrom, and thereafter to be returned to this Court when no longer required in said criminal action and said Grand Jury investigation".

An order was made on the same day by Judge Wagler permitting the use of said money, wrappers and envelopes, and a receipt therefor was given by the District Attorney and filed.

On September 6, 1946, an ex parte order was made by another Judge of the Superior Court, ordering that the $50,000, the wrappers and the envelopes be made available for use as evidence upon the trial of the action of People v. Stern, Stock and said five others "and be kept open to the inspection of both the People * * * and the said defendants pending such trial."

On September 10 another order was made by Judge Wagler. It refers to the order of September 6 (just referred to) and recites that the Judge sitting in Department 3, "before whom the said criminal case hereinabove referred to is now pending, duly and regularly ordered, adjudged and decreed that the said property be made available by undersigned Judge of the Superior Court of the State of California, acting as a Magistrate, before the said Department No. 3 of the said Superior Court for use as evidence upon the trial of said action and be kept open to the inspection of both the People of the State of California and the said defendants pending such trial; and good cause appearing therefor, and pursuant to the aforementioned order of said Superior Court made on the 6th day of September, 1946,

"It Is Now Hereby Ordered, Adjudged And Decreed that the property described in said Exhibit 'A' and hereinabove referred to be made available by the said District Attorney of the County of Alameda, State of California before Department No. 3 of the Superior Court of the State of California in and for said County, for use as evidence upon the trial of said action."

The petition alleges that the $50,000 seized is not described in the search warrant and that the respondents are especially enjoined by law, and particularly by section 1540 of the Penal Code, to restore the $50,000 to the persons from whom it was taken. It further shows that on September 4 petitioner Stern filed a motion for the return of said property which motion was heard and denied on September 6.

It alleges that petitioner Stern is under indictment by the grand jury of Alameda County; that Katherine Reid is his wife, and Daniel Reid his son; that the $50,000 cannot serve any purpose that petitioners' receipt therefor could not serve "and the retention thereof deprives petitioners of their right and ability to prepare said Stern's defense" but that the District Attorney threatens to use the $50,000 as evidence upon the trial unless restoration be ordered. The petition alleges that the petitioners are beneficially interested therein and that they have no plain, speedy or adequate remedy in the ordinary course of law.

The respondents filed three identical returns. In their answers they make certain denials for want of information or belief, but practically all the denials are addressed to the allegations of the petition relating to the duty of respondents to restore the money, or other similar legal questions. It may safely be said that the only issue of fact raised by the answers is as to the petitioners' allegation that Katherine Reid is the wife of petitioner Stern and that Daniel Reid is his son. Those relationships are denied for want of information or belief. The issues of law raised by the return—and they are numerous—will be discussed presently.

The petitioners' position may be briefly stated. It is simply this: Section 19 of article 1 of the Constitution of California provides that the sworn showing required for the issuance of a search warrant must particularly describe the things to be seized; section 1525 of the Penal Code likewise requires that the affidavit must particularly describe the property; section 1540 requires the magistrate to cause the property to be restored to the person from whom it was taken if the property taken is not the same as that described in the warrant, and that, in the instant case neither the $50,000 nor currency in that amount, nor any money whatever, was described in the affidavit or in the search warrant, but the $50,000 was taken, nevertheless, and should be restored.

The principal ground urged by the respondents at the hearing was that none of them can be under a duty to restore in the absence of proof of the ownership of the money and that at the hearing of the motion for restoration on September 6 before Judge Wagler no such proof was made.

The affidavit which Lieut. Wells presented to Judge Wagler on August 23 laid the foundation for the search warrant. A copy of it is attached to and made part of the petition. The answer not only expressly admits its contents but affirmatively alleges that the affidavit was made. Hence there is no controversy whatever over the affidavit or its contents. It is in the record by the pleading of both sides.

Therein Lieut. Wells deposes "that there are now in the possession of the said Samuel M. Stern and the said Maurice F. Stock in a safety deposit box number 3076 in the Central Bank * * * said box being in the name of Daniel Reid and Katherine Reid" the articles sought.

This alleges directly and in express terms Stern's possession. It likewise alleges the Reids' possession by stating that the box stands in their names. Possession, then, by Stern and the two Reids is definitely asserted.

Section 1963, Code Civ.Proc. provides that "all other presumptions are satisfactory, if uncontradicted. * * * The following are of that kind: * * * 11. That things which a person possesses are owned by him; * * *."

[1] Ever since Lieut. Wells' affidavit was laid before Judge Wagler on August 23 that has been before the court. At the time of the motion before Judge Wagler on September 6 this, certainly, was the state of the record and it was sufficient evidence of the petitioners' title without any further showing.

The search warrant itself recites that the box stands in the name of Katherine and Daniel Reid and the return shows that the $50,000 was discovered in, and taken from, a box standing in their names.

At the hearing an amendment of the petition was allowed over the respondents' objection which alleges—as the original petition did not—that petitioner Stern was and is the owner of the money with right of possession thereof and that Katherine and Daniel Reid are the tenants of box 3076 from which it was taken.

At the hearing petitioners offered in evidence an affidavit of petitioner Stern setting forth that he was on August 23, 1946, and now is, the owner of the money and entitled to the possession and disposition thereof; also an affidavit of Katherine Reid in corroboration thereof; also an affidavit of Leslie C. Gillen, one of petitioners' counsel, identifying the transcript of the proceedings of September 6 on the motion for restoration before Judge Wagler.

Counsel for respondents made no objection to the transcript, but did object to the admission of the three affidavits. Later the objections were withdrawn in part and the three affidavits were admitted. Their admissibility is questionable but we do not consider the matter important as we are prepared to hold that, disregarding the affidavits entirely, the evidence before the respondents—based on the presumption of ownership flowing from possession—was all one way and we base our decision on this phase of the case solely on that proposition and not at all on the affidavits.

What has just been said answers the respondents' contentions that the petition did not allege facts—as distinguished from conclusions—showing that petitioners are parties beneficially interested (1086, Code Civ. Proc.); also that Stern, when he moved for a return of the money on September 6 was not a party beneficially interested. If he was an owner of the money with the Reids, or the sole owner thereof, he certainly was a party beneficially interested.

It also disposes of the only issue of fact remaining in the case, namely whether Katherine Reid is the wife and Daniel Reid the son of petitioner Stern. If Katherine and Daniel Reid were owners it would not matter whether they were related to Stern or not. Even if they were not owners, their possessory right as tenants of the box would make them parties beneficially interested.

[2] Another point relied on by respondents is that the petitioners have a plain, speedy and adequate remedy at law. At the hearing counsel for respondents suggested that such other remedy would be found in an action at law in claim and delivery to recover the $50,000—in specie. Assuming that an action could be maintained to recover currency which is not ear-marked or identifiable (which is doubtful, see 5 Cal.Jur. p. 160, sec. 3) it is clear that they could not sue the respondent Superior Court, nor a Judge or Judges thereof. If driven to an action against the County Clerk they would be met at once obviously with the defense that the money was in custodia legis. No other remedy was suggested by the respondents.

[3] By way of demurrer the petition is claimed to be uncertain, ambiguous and unintelligible in that it cannot be ascertained therefrom in whose possession, custody or control the $50,000 now is—whether in evidence in People v. Stern et al. or in evidence before the grand jury. Further whether it is in the possession of the respondent Superior Court, or Judge Wagler as a Judge thereof, or Judge Wagler as a magistrate, or any of the respondents.

No authority need be, or will be, cited on the settled rule that when facts are within the knowledge of defendants they cannot assert uncertainty. The respondents know "where or in whose possession, custody or control the $50,000.00 * * * now is". But, over and above that, the District Attorney's affidavit already quoted, which is an exhibit to the petition and part of it, shows that it is "in the possession of the above-entitled [Superior] Court". It was to that court that the District Attorney applied for its temporary use before the grand jury, and in the prayer of the affidavit he shows that it is "to be returned to this [Superior] Court". Judge Wagler's order of August 30, likewise part of the petition, shows that the property is to be delivered to the District Attorney "subject to the further orders of this Court". The order of September 6, likewise part of the petition, shows the Superior Court was exercising control over the money and Judge Wagler's order of September 10 (already quoted) shows that he was then exercising control over it, and turning it over to Department 3.

At the hearing it was brought out that the money is at present in the physical custody of the County Clerk of Alameda County. The claim is made, however, that it is in his hands not as ex-officio clerk of the Superior Court, but as ex-officio clerk of the grand jury. This is rather difficult to follow, particularly in view of the order of September 10 allocating it to Department 3 for use in the trial.

[4] In their second defense the respondents plead that ever since September 3 it has been and is now impossible for Judge Wagler to restore the $50,000 and that he "will continue to be unable to comply with any order, judgment decree or mandate purporting to command or order him to do so" because ever since September 3 the money "has been out of his possession

and custody and not subject to his control". On September 6 he heard and acted on the motion for restoration and on September 10 he signed the order already quoted making the money "available by the said District Attorney of the County of Alameda * * * before Department No. 3 of the Superior Court * * * for use as evidence upon the trial" of the criminal case. Moreover, if it was his duty to restore the money as soon as he learned it had been improperly seized, that duty still rests on him.

[5] In their third defense the respondents plead that at no time prior to the filing of the petition in this court on October 9 was there a demand for the restoration of the money, and that the petitioner Stern did not at any time prove his ownership of the money.

On September 4 a notice of "Motion for return of property" signed by the attorneys of record for petitioner Stern was served on the District Attorney, after the hearing had been set by Judge Wagler for September 6. It showed clearly the grounds on which the motion would be made. On September 6 the motion was presented to Judge Wagler, an assistant District Attorney representing the People at the hearing. A transcript of the proceedings is in evidence in this proceeding. It shows that Stern's counsel clearly brought to Judge Wagler's attention the reasons for the restoration of the money, which are the grounds urged here, namely that no money was described in the affidavit with particularity or at all. Such motion, formally made, would seem to be such demand. With respect to proof of ownership Judge Wagler then had in the files of the court the affidavit alleging possession, therefore presumptive ownership, as we have already pointed out.

We might add that the answer herein pleads that prior to the hearing on September 6 the deputy District Attorney "served" on Judge Wagler a copy of the order of the same day, already referred to, which had been made by a brother Judge sitting in Department 3, and it would seem that the respondents are now relying upon that order as of some significance because it was signed by a Judge of the Superior Court sitting in a trial department and "served" on another Judge of the same court who happened, also, to have signed the warrant acting as a magistrate. Such orders are merely intermediate orders. See De La Beckwith v. Superior Court, 146 Cal. 496, 499, 80 P. 717 where the subject is fully discussed. The Superior Court is, after all, but one court.

[6] The respondents urge that "Mandamus will not issue where its enforcement tends to violate the spirit of the law". Under that head they argue that the $50,000 is valuable to the People as evidence in the pending criminal action and is at the present time in evidence in the grand jury as an exhibit in its investigation.

It might be remarked that the fact that petitioners had $50,000 in currency in the denominations already shown in a safe deposit box can be proved at the trial (if admissible) by the person or persons who actually took the currency from the box. Exhibiting it to the jury is not necessary to prove the fact, if it is admissible at all.

[7] While our courts have held that evidence illegally obtained may be admitted in evidence, there can be no justification for any court abusing its own process to secure the production of evidence in plain violation of the constitutional and statutory guarantees against illegal searches and seizures.

[8] The petitioners allege that the retention of this money deprives them of their right and ability to prepare Stern's defense. This is an immaterial allegation. The petitioners either are, or are not, entitled to a restoration of the money as a matter of right, regardless of the use to which they might put it.

The constitutional guaranty respecting searches and seizures (Art. I, sec. 19, Const. of California) is as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue, but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized."

Section 1525 adopts the constitutional language respecting a particular description of the property. It reads as follows:

"A search-warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched."

The affidavit on which the search-warrant was issued describes the property sought as follows: "certain articles records and property which were used as a means of committing said offense; * * *. That the said articles, records and property are described particularly as follows, to-wit: certain records, reports, day books, diaries, account books, correspondence, memoranda or other evidence and any and all other writings to, from, concerning or containing reference to the said (two women, naming them) and to any other person or persons upon whom the said Samuel M. Stern and the said Maurice F. Stock did procure, or attempt to procure a miscarriage * * *."

It is perfectly clear that there is no mention whatever of the currency in question, or of any money at all.

The search-warrant describes the articles sought as follows: "Certain medical certificates, records and correspondence pertaining to said medical certificates, in the name of Samuel M. Stern and Maurice F. Stock, certain records, reports, day books, diaries, account books, correspondence, memoranda, other evidence, and other writings to or from, concerning or containing a reference to the said (two women, naming them) and other persons upon whom said abortions were performed."

No money is described therein.

Section 1540 of the Penal Code carries out the constitutional assurance by providing for a return to the citizen of property improperly taken from him under color of a search-warrant as follows: "Property, when to be restored to person from whom it was taken. If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken."

[9] It does not put the burden on the citizen of suing to get the property back. It makes it the duty of the magistrate to see to its restoration by a mandatory "must". There is no discretion about it. Upon ascertaining that the property taken is not that described in the warrant—and it is not difficult to do that—he must not order its return, but must "cause it to be restored." Further, the statute says nothing about ownership, it deals only with possession.

[10] It was the plain duty of the magistrate in this case to have caused the $50,000 to be returned to box 3076 as soon as the lieutenant's return and inventory showed him that it had been taken therefrom. And it has been his duty to do so ever since.

The respondents do not contend that the money was described under the words "or other evidence" nor could such claim be made. People v. Mayen, 188 Cal. 237, 242, 205 P. 435, 24 A.L.R. 1383.

In addition to what has been said it is clear that the money taken was not within the terms of section 1524 which states the cases in which a search-warrant will issue, as follows:

"It may be issued upon either of the following grounds: * * *

"2. When it was used as the means of committing a felony; in which case it may be taken on the warrant from the place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be.

"3. When it is in the possession of any person with the intent to use it as a means of committing a public offense, * * *."

The petitioners have shown a clear and definite right to a writ in this case.

It is therefore ordered that a peremptory writ of mandate issue directing the respondents, and each of them, to forthwith cause to be returned and restored to these petitioners, the $50,000 taken from them on August 23, 1946, under said search-warrant which money is described in the inventory filed with the return in the respondent Superior Court.

NOURSE, P. J., and DOOLING, J., concur.

AETNA CASUALTY & SURETY CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al., and twelve other cases.*

Civ. 13160.

District Court of Appeal, First District, Division 2, California.

Nov. 7, 1946.

Rehearing Denied Dec. 7, 1946.

Hearing Granted Dec. 26, 1946.

1. Statutes 🔑263

Statutes must not be given retroactive application unless such intention clearly appears. Civ.Code, § 3.

2. Statutes 🔑263

A "retrospective law" is one affecting rights, obligations, acts, transactions, and conditions performed or existing before adoption of statute, and terms "retrospective" and "retroactive" are interchangeable.

See Words and Phrases, Permanent Edition, for all other definitions of "Retroactive", "Retrospective" and "Retrospective Law".

3. Statutes 🔑265

The rule that statute is presumed to operate prospectively only, unless contrary intent clearly appears, is especially applicable where retroactive operation thereof would impair obligations of contracts or interfere with vested rights.

4. Workmen's compensation 🔑55

The section of Labor Code, providing that no proceeding commenced before code takes effect or right accrued is affected by provisions thereof, applies to subsequent amendments thereto, in view of section declaring that reference to any portion of code shall apply to all amendments thereto. Labor Code, §§ 4, 9.

5. Workmen's compensation 🔑73

In determining Legislature's intention in enacting statute amending provision of Labor Code respecting compensation where employee sustains injury causing both temporary and permanent disability, Legislature must be presumed to have known existing law and enacted amendment in conformity therewith. Labor Code, § 4661.

6. Workmen's compensation 🔑60

Workmen's Compensation Acts are given nonretrospective interpretation, so as to render amendments thereto increasing or decreasing amounts of compensation for injuries, inapplicable to injuries sustained before effective dates thereof, in absence of affirmative declarations of Legislature's intention to give statutes retroactive effect.

7. Workmen's compensation 🔑60

The amendment of Labor Code by adding provision that injured employee, entitled to temporary disability payment exceeding 25 per cent. of permanent disability payment, to which he is also entitled, shall be paid 75 per cent. of permanent disability payment in addition to temporary disability payment, is not retroactive, but prospective, and inapplicable to injuries occurring before its effective date, though Constitution establishes policy for protection and rehabilitation of injured workmen and their compensation status is open to adjustment in whatever manner Legislature chooses to provide by statute. Labor Code, § 4661; Const. art. 20, § 21.

8. Constitutional law 🔑48

Where Legislature's power to make statute retrospective is denied or deemed doubtful, statute should be given construction which will render it valid and operative, and Legislature must be deemed to have enacted it for valid and constitutional purpose rather than purpose which might be held unconstitutional.

9. Constitutional law 🔑48

When constitutionality of statute is doubtful, court's duty is to adopt interpretation which will render statute constitutional.

10. Statutes 🔑212

The Legislature, in enacting statute, is presumed to know the law and rules of statutory construction followed by state courts.

11. Constitutional law 🔑154(1), 301
Workmen's compensation 🔑15

The Labor Code amendment, adding provision that injured employee, entitled to temporary disability payment exceeding 25 per cent. of permanent disability payment, to which he is also entitled, shall be paid 75 per cent. of permanent disability payment in addition to temporary disability payment, would be invalid as violating due process and contract impairment provisions of federal Constitution, if construed as applicable to pre-existing awards of compensation, as well as to subsequent awards for pre-existing injuries, even if amendment were in accord with workmen's compensation provision of state Constitution. Labor Code, § 4661; Const.Cal. art. 20, § 21; U.S.C.A.Const. art. 1, § 10, cl. 1; Amend. 14.

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* Subsequent opinion 182 P.2d 159.

12. Constitutional law ⚷113, 251

The federal Constitution is limitation of states' powers and prohibits state from passing any law contrary to its injunctions against taking of property without due process of law and impairment of contracts, whether such law is passed by constitutional amendment, initiative vote of people, or Legislature. U.S.C.A.Const. art. 1, § 10, cl. 1; Amend. 14.

13. Workmen's compensation ⚷1765

An award of compensation by Industrial Accident Commission for industrial injuries has all the semblances of a judgment of a court at law and should be governed by same rules.

14. Constitutional law ⚷152

A judgment being a contract within contemplation of federal Constitution, an award of compensation by State Industrial Accident Commission enjoys same constitutional protection against impairment of contracts. U.S.C.A.Const. art. 1, § 10, cl. 1.

15. Statutes ⚷263

When there was serious doubt at time of passage of statute as to whether it could be made retroactive, Legislature will be presumed to have intended that it should be prospective only.

16. Constitutional law ⚷81

The state's police power must be exercised within limited ambit, is subordinate to constitutional limitations, springs from state's obligation to protect its citizens and provide for safety and good order of society, and gives state no unrestricted authority to accomplish whatever the public may presently desire.

17. Constitutional law ⚷301

The Labor Code amendment, providing for payment of 75 per cent. of permanent disability payment in addition to temporary disability payment to injured employee entitled to temporary disability payment exceeding 25 per cent. of permanent disability payment to which he is also entitled, is controlled by due process limitations in federal Constitution, though such increase in compensation is in interest of public health, safety, or welfare, and hence an exercise of state's police power. Labor Code, § 4661; U.S.C.A.Const.Amend. 14.

◆

Proceedings under the Labor Code by the Aetna Casualty & Surety Company, insurance carrier, and Frank E. Barrow and others, employers, for writs of review to annul awards of compensation by the Industrial Accident Commission to William Charlesworth and others, employee, for temporary and permanent disability.

Awards annulled.

Brobeck, Phleger & Harrison, of San Francisco (Maurice E. Harrison and Moses Lasky, both of San Francisco, of counsel), for all petitioners in all cases.

John H. Black and Edward R. Kay, both of San Francisco, for petitioners in No. 13206.

George R. Haswell and Thomas F. McGrath, both of Los Angeles, for petitioners in No. 13212.

S. Norman Hays, of San Francisco, for petitioners in No. 13157.

Herlihy & Herlihy, of Los Angeles, for petitioners in Nos. 13160 and 13219.

Keith, Creede & Sedgwick, of San Francisco, for petitioners in No. 13159.

Leonard, Hanna & Brophy, of San Francisco, for petitioners in Nos. 13156, 13158, and 13163.

F. Carlton Myers, of Los Angeles, for petitioners in No. 13160.

Claude F. Weingand, of Los Angeles, for petitioners in No. 13212.

Donald Gallagher, of San Francisco, for petitioners in Nos. 13175, 13192, and 13193.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn, Asst. Atty. Gen., amici curiae on behalf of respondents.

George Olshausen and John K. Hagopian, both of San Francisco, amici curiae on behalf of respondents.

Charles J. Janigian and Charles P. Scully, both of San Francisco, amici curiae on behalf of respondents for California State Federation of Labor.

R. C. McKellips, John A. Rowe, Jr., and Joseph Sheehan, all of San Francisco, for respondents.

NOURSE, Presiding Justice.

The within petitions for writs of review all involve the same question. In view of that fact stipulations were entered into and orders of court made under which thirteen of the petitions are supported by one memorandum of points and authorities, one answer by the Industrial Accident Commission and one reply brief and forty-nine similar petitions were agreed to follow the decision in this case. Briefs of amici curiae support the position of respondent. The petitions which are consolidated by the stipulation under number 13160 are as follows: 13156, 13157, 13158, 13159, 13163, 13175, 13192, 13193, 13201, 13206, 13212, and 13219. The commission assumes the burden of the defense of all the interested employees and will herein be referred to as the respondent.

On September 2, 1942, William Charlesworth was an employee of Frank E. Barrow, one of the petitioners herein, and on that day sustained an injury arising out of and in the course of his employment. The employer, a school teacher, employed Charlesworth to work as a carpenter on a summer home and in order to protect himself from possible liability the employer took out a policy of workmen's compensation insurance with the Aetna Casualty and Surety Company, petitioner herein, covering the period from August 20, 1942, to September 20, 1942. On July 20, 1945, the employee filed an application for adjustment of claim with the commission, claiming both temporary and permanent disability. Hearing on the application was had on August 17, 1945.

At the time of the occurrence of the injury section 4661 of the Labor Code read as follows: "Where an injury causes both temporary and permanent disability, the injured employee is not entitled to both a temporary and permanent disability payment, but only to the greater of the two." By Statute of 1945, Ch. 1335, Sec. 1, there became effective on September 15, 1945, an amendment to section 4661 of the Labor Code, which added the following provision: "except that where the temporary disability payment exceeds 25 per cent of the permanent disability payment the injured employee shall be paid 75 per cent of such permanent disability payment in addition to the temporary disability payment."

On March 11, 1946, the commission issued its award. It found that the injury caused the employee both temporary and permanent disability; that the permanent disability was of such character as in the absence of a temporary disability entitled the employee to $6400; and that temporary disability payments had been made in excess of 25 per cent of the permanent disability payment. In view of the latter fact it was held, under amendment to section 4661, that the employee should be paid 75 per cent of the permanent disability payment in addition to the whole of the temporary disability payments, and an award of $4800 was made in his favor. A petition for rehearing was denied on April 9, 1946.

The issue presented by all of these petitions is whether the commission exceeded its jurisdiction in applying the greater liability provided for by the amendment to Labor Code Sec. 4661 to injuries which occurred prior to the effective date of the amendment.

It is petitioners' main contention that as a matter of construction under the weight of authority and California law a statute such as the amendment to section 4661 may not be interpreted to apply retroactively unless that intention affirmatively appears in the statute; that an amendment to the Workmen's Compensation Act changing the amount of compensation relates to the substantive rights of the parties rather than to a mere remedy and hence it may not be given effect in a case where the injury occurred before the amendment. Petitioners' secondary contention is that since an increase in the amount of compensation affects a substantive right, a retroactive application of the amendment to section 4661 to injuries occurring prior to

September 15, 1945, would violate the due process and the impairment of contract provisions of the state and federal Constitutions. Const.Cal. Art. 1, §§ 13, 16; U.S.C.A.Const. Art. 1, § 10, cl. 1; Amend. 14.

The respondent argues that under Art. XX, sec. 21, of our Constitution the protection and benefits of workmen's compensation are the policies of the state and the legislation must therefore be construed to remedy the evils it was intended to terminate—to protect against the depletion of funds during a prolonged temporary disability which would prevent rehabilitation of an injured worker. It is contended that the rights and liabilities involved are not founded on contract but evolve from an employer-employee status which may be regulated at any time. The respondent also argues that the application of the amendment to section 4661 to prior injuries is required by section 11 of the Labor Code which provides that the present tense includes the past. In answer to petitioners' main contention the respondent argues that workmen's compensation is concerned with industrial disability and with the injury only as an antecedent fact, hence the application of the amendment to an injury occurring prior to the effective date of the statute does not constitute a retroactive application. In answer to petitioners' secondary argument the respondent contends that section 4661 is a reasonable regulation justifiable under the police power and hence it is not a deprivation of due process nor does it impair the obligations of contracts.

[1] Petitioners ground their main contention on the well established rule of statutory construction that legislative acts are not to be given a retroactive application unless that intention clearly appears.

This rule of construction, in so far as it relates to statutory law in this state, is founded on section 3 of each of the four original codes. In the early California cases the rule was given recognition in one brief sentence. Bascomb v. Davis, 56 Cal. 152; Sharp v. Blankenship, 59 Cal. 288; In re Estate of Richards, 133 Cal. 524, 527, 65 P. 1034; In re Estate of Frees, 187 Cal. 150, 155, 201 P. 112, and In re Cate, 207 Cal. 443, 448, 279 P. 131, these earlier cases were affirmed. In the Cate case the Supreme Court said: (207 Cal. at page 448, 279 P. at page 133) "It is a canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intention. Our Civil Code contains the express provision that 'No part of it is retroactive, unless expressly so declared' (Civ. Code, § 3), and this court has frequently decided that a like rule is to be applied generally to statutory construction. (Bascomb v. Davis, 56 Cal. 152; In re Estate of Richards, 133 Cal. 524, 65 P. 1034; In re Estate of Frees, 187 Cal. 150, 156, 201 P. 112, and cases cited; Cooley, Const. Limitations (7th Ed.), p. 539; Endlich on Interpretation of Statutes, p. 362.)"

[2] In accord are American States Water Service Co. of California v. Johnson, 31 Cal.App.2d 606, 88 P.2d 770; Ware v. Heller, 63 Cal.App.2d 817, 822, 148 P.2d 410; Jones v. Union Oil Co., 218 Cal. 775, 777, 25 P.2d 5; and see 23 Cal.Jur. p. 629 et seq. A retrospective law as considered in these authorities is "one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute. The terms 'retrospective' and 'retroactive' are interchangeable. City of Los Angeles v. Oliver, 102 Cal.App. 299, 309, 283 P. 298; 5 Cal.Jur. 747, sec. 142; 12 C.J. 1084, sec. 778." American States Water Service Co. of California v. Johnson, supra, 31 Cal. App.2d at page 613, 88 P.2d at page 774.

[3] Pertinent language on the same subject is found in Jones v. Union Oil Co., supra, 218 Cal. at page 778, 25 P.2d at page 6: "The rule that a statute is presumed to operate prospectively only, unless an intent to the contrary clearly appears, is especially applicable to cases where retroactive operation of the statute would impair the obligations of contracts or interfere with vested rights. Hoyt Metal Co. v. Atwood, 9 Cir., 289 F. 453."

A clear expression of the rule and of how it operates is found in 50 Am.Jur. p. 500 reading: "Ordinarily, an intention to give a statute a retroactive operation will not be inferred. If it is doubtful whether the statute or amendment was intended to operate retrospectively, the doubt should be resolved against such operation. It is especially true that the statute or amendment will be regarded as operating prospectively only, where it is in derogation of a common-law right, or where the effect of giving it a retroactive operation would be to interfere with an existing contract, destroy a vested right, or create a new liability in connection with a past transaction, invalidate a defense which was good when the statute was passed, or, in general, render the statute or amendment unconstitutional."

[4, 5] Aside from the unanimous rulings of our appellate courts, and the express provisions of the four basic codes, we find the same principles recognized in the Labor Code. Section 4 reads: "No action or proceeding commenced before this code takes effect, and no right accrued, is affected by the provisions of this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible." That the section was intended to apply to subsequent amendments to the Labor Code appears from section 9 which declares: "Whenever any reference is made to any portion of this code or of any other law of this State, such reference shall apply to all amendments and additions thereto now or hereafter made." These provisions of the Labor Code must be given special weight when we come to the question of the intention of the legislature in enacting the 1945 amendment. It must be presumed that the legislature knew the existing law and that the amendment was enacted in conformity with it.

[6] This non-retrospective interpretation has been specially applied in industrial accident and pension cases without exception. In the early case of Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 P. 398, which determined the constitutionality of the original Workmen's Compensation Act, the supreme court said, 170 Cal. at page 698, 151 P. at page 403: "Laws must be framed so as to respect existing and vested property rights, and so as to operate equally upon all who are similarly situated with respect to such laws. But the laws defining rights of property, personal relations, or the obligations of individuals to their fellow-beings or to the state may, in general, be molded and altered by the states at will, if the change does not affect acts previously done, or property rights previously acquired. Therefore a law which disturbs no vested right of property, which is not retroactive in its operation upon the conduct of persons, but which, looking to the future, merely changes the existing rules governing the liability of masters for injuries caused by accidents occurring to their servants while in the service, does not come within the scope of the fourteenth amendment. It is simply an exercise by the state of its governmental power to pass laws regulating the ordinary private rights of persons and property. The law in question is of this character. It does not affect past transactions or previously acquired rights of person or property. It provides for a notice and a hearing as to liabilities arising under it, and it bears alike upon all affected by its provisions."

In Hyman Bros. Box & Label Co. v. Industrial Accident Comm., 180 Cal. 423, 181 P. 784, where a workman was injured in December of 1917 while feeding a printing press it was held that "his rights must be measured by the Workmen's Compensation Act of 1913, as amended in 1915, * * * which was then in force." 180 Cal. at page 424, 181 P. at page 784. In Hendrickson v. Industrial Accident Comm., 215 Cal. 82, 8 P.2d 833, which involved an amendment to the Workmen's Compensation Act providing for a 10% increase in an award if the employer wilfully failed to secure payment of the compensation as required by the Act, the court held, 215 Cal. at page 84, 8 P.2d at page 834: "The injury occurred on May 21, 1929. The increase of ten per cent. was provided for in section 29 (c) as amended in 1929. St.1929, p. 551. The amendment became effective on August 14, 1929, or about three months after the date of the injury. It is conceded by the commission that the amendment was not retroactive, and that the increase of ten per cent. was inapplicable to the case. For this reason, the award must in any event be annulled." Holmberg v. City of Oakland, 55 Cal.App. 270, 203 P. 167 was a case involving a provision in the city charter with respect to compensation of policemen. Plaintiff was injured on October 3, 1914, and was given a surgical operation for the injury on March 16, 1920; the charter provision allowing compensation went into effect on January 18, 1919. The court held that the section of the charter was not applicable to injuries sustained prior to the date it became effective. In holding against a retroactive application the court stated, 55 Cal.App. at pages 271 and 272, 203 P. at page 168: "This conclusion is further enforced by the construction which has been quite uniformly applied to compensation laws, which is to the effect that the state of the law at the time of the injury is to be taken as the measure of the right of recovery of the injured person. It was so held by our Supreme Court in the case of Hyman Bros. Box & Label Co. v. Industrial Acc. Comm., 180 Cal. 423, 181 P. 784, and the rule therein stated follows in the line of the general authority in other jurisdictions." (Citing cases.)

In a well considered case in the State of Washington the court had under consideration an amendment to the Workmen's Compensation Act increasing the allowance to the widow of a deceased employee from $35 to $50 a month. In holding that the 1941 amendment was not applicable to a case of death or injury occurring prior to its enactment the court said: "It is a fundamental rule in this state that a statute will be presumed to operate prospectively only, and that it will not be held to apply retrospectively in the absence of language clearly indicating such legislative intent. (Quoting cases.)

"It is also the general rule in this state that awards payable under the Workmen's Compensation Act are governed by the law in effect at the time the injury to the workman occurred. (Quoting cases.)

"If referendum measure 22 be read and construed in the light of the rules hereinbefore stated, our conclusion must be that the provision for increased pensions to the widows of injured workmen speaks in futuro and includes only those cases where the injury to the workmen occurs subsequent to the effective date of the measure, December 3, 1942." Lynch v. State, 19 Wash. 2d 802, 145 P.2d 265, 267.

To the general statement that compensation acts authorizing awards for industrial injuries as well as those providing for pensions are applicable only to rights thereafter accrued, see Matkosky v. Midvale Co., 143 Pa.Super. 197, 18 A.2d 102; Gauthier v. Penobscot Chemical Fiber Co., 120 Me. 73, 113 A. 28; Neglia v. Zimmerman, 237 N.Y. 131, 142 N.E. 442; Virden v. Smith, 46 Nev. 208, 210 P. 129; United Iron Works v. Smethers, 159 Okl. 105, 14 P.2d 380; Leon v. Crowell & Spencer Lumber Co., 151 La. 932, 92 So. 389; Soderstrom v. Curry & Whyte, 143 Minn. 154, 173 N.W. 649; State ex rel. Globe Indemnity Co. v. District Court, 132 Minn. 249, 156 N.W. 120; Cote v. Bachelder-Worcester Co., 85 N.H. 444, 160 A. 101, 82 A.L.R. 1239; Illinois Zinc Co. v. Industrial Comm., 366 Ill. 480, 9 N.E.2d 212.

It would serve no purpose to multiply these citations. Some of the cases hold with the rule of In re Cate, 207 Cal. 443, 279 P. 131, that a retroactive effect will not be given unless that intention is clearly expressed. Others hold that the legislature could not give that effect to the statute because in changing the amount of payments the legislation deals with the substantive rights of the parties and such a change would offend due process and the clause prohibiting the impairment of the obligation of contracts.

Heretofore we have spoken of the intent of the legislature in enacting the amendment of 1945. The question of power to make it retroactive is indirectly involved. But linked with the question of intention is the pertinent phrase found in the footnote 95(a) at p. 338 of 71 C.J., reading:

" 'If the Legislature may increase awards, it may also decrease them. To permit subsequent legislation to increase or diminish the compensation specified in awards would be to strike down vested rights. Then no one would be secure. The resulting uncertainty, distrust, and confusion would destroy the compensation plan itself.' Riggs v. Lehigh Portland Cement Co., 76 Ind.App. 308, 131 N.E. 231, 232."

Rules of limitation of the powers of the legislature are designed to meet all in the same circumstances and to apply to all without regard to race, color or other conditions. Assuming that the legislature had the constitutional power to reduce a pre-existing award it is apparent that a statute which did not appear on its face to apply retroactively might be enacted with many members of the legislature, as well as the beneficiaries of prior awards, unaware that such would be its effect. This merely emphasizes the soundness of that rule of construction requiring some affirmative declaration of intention before the statute can be held retroactive.

[7] The answer of respondent consumes many pages in arguing the policy behind the Workmen's Compensation Acts and the inadequacies in compensation which the 1945 amendment endeavored to correct. We have not found that the petitioners have at any time questioned that policy or that they have denied the right of the legislature to amend the statute so as to provide the necessary adjustments in the payments of compensation for injuries. The petitioners have presented two plain issues—that the 1945 amendment was not intended to be retroactive when it was enacted and that the legislature could not have made it retroactive because of the inhibitions of the state and federal Constitutions. We may therefore, without further comment, dispose of the frequent repetitions of the argument that Art. XX, Section 21 of the state Constitution established a policy for the protection and rehabilitation of workmen suffering from industrial injuries and that this status of the employee is open to readjustment in whatever manner the legislature chooses to act. The real issue involved is whether the legislature elected to make the 1945 amendment retroactive. The question of policy is no criterion for the interpretation of a statute of this character. It is more reasonable to infer that the legislature, having full knowledge of the settled rules of interpretation heretofore referred to, chose to follow those rules and so to provide for a standard governing future awards. It would be an unreasonable inference that, having resolved that awards for pre-existing injuries should be increased, it would intentionally fail to declare the amendment retrospective and thus permit confusion and uncertainty to result.

For these reasons we cannot declare that because it would have been a beneficent act for the legislature to have expressly made the amendment applicable to pre-existing injuries, we will overlook its failure to do so and supply by court decree the declaration which the legislature declined to make. We must look at what the legislature did, and not at what it might have done. Hence we must hold that the amendment is prospective and inapplicable to any injury occurring prior to its effective date.

[8-10] All parties argue the question of the power of the legislature to make such a statute retroactive. This issue is presented with greater vigor than the other but it requires consideration only because it bears upon the other issue of legislative intention. It bears on the question of intention in this way—if the power to make the statute retrospective is denied, or deemed doubtful, it is a settled rule of construction that the statute should have that construction which would make it valid and operative and that the legislature must be deemed to have enacted it for a valid and constitutional purpose rather than for a purpose which might be held unconstitutional. And it is the duty of the courts, when doubt arises over the constitutionality of a statute, to adopt that interpretation which would render the statute constitutional. 23 Cal.Jur. p. 757. To restate—the legislature is presumed to know the law and the rules of statutory construction followed by the courts of the state. Hence, when the 1945 amendment was adopted the legislature, knowing that there was serious doubt whether the legislation could be made retroactive (for the reasons hereafter stated), must be presumed to have chosen the valid course and thus refrained from

declaring the statute retroactive. And when such doubt exists it is the duty of the courts to adopt that construction which will render the statute valid and operative. This principle is well stated in 11 Am.Jur. pp. 725-728, supported by a long list of citations:

"It is an elementary principle that where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the court should adopt the construction which would uphold it. It is the duty of courts to adopt a construction of a statute that will bring it into harmony with the Constitution, if its language will permit."

[11, 12] The question of the validity of the amendment if applied to pre-existing awards is presented directly in Columbia Steel Company v. Industrial Accident Commission, Cal.App., 174 P.2d 50, but is argued in the briefs in these cases as well. Because of our ruling on the question of legislative intent it does not require extended consideration. But the insistence of respondent that the amendment is applicable to pre-existing awards as well as to subsequent awards covering pre-existing injuries necessitates a brief reference to the point.

Petitioners assert that such an interpretation would offend both the federal and the state Constitutions. Respondent answers that the amendment is in accord with Article XX, Section 21 of the state Constitution which eliminates all other constitutional inhibitions. The answer does not meet the injunctions of the federal Constitution relating to due process and impairment of contracts. The federal Constitution is a limitation of the powers of the several states. Under it a state is prohibited from passing any law contrary to those injunctions. It makes no difference whether such a state law is passed by constitutional amendment, by the initiative vote of the people, or by the legislature. Our state courts have consistently followed this rule, and hence respondent relies on Schmidt v. Wolf Contracting Co., 269 App.Div. 201, 55 N.Y.S.2d 162 as their authority for the proposition that no federal guaranty is applicable to a state statute which is designed for the benefit and rehabilitation of injured employees. That decision was rendered on May 9, 1945, while the California legislature was in session, but we are not informed as to the date when the amendment to section 4661 of the Labor Code was passed or whether the legislature had knowledge of the decision at that time. Suffice it to say that the Schmidt case to this extent is new law and out of harmony with all the authorities in this and other states.

In Jones v. Union Oil Co. 218 Cal. 775, 778, 25 P.2d 5, our supreme court said: "It is well established in this state that a judgment is a contract as contemplated by the Constitution. Scarborough v. Dugan, 10 Cal. 305; Miller v. Murphy, 186 Cal. 344, 199 P. 525; 14 Cal.Jur., p. 852. One of the incidents of the judgment contract under section 671 of the Code of Civil Procedure prior to the amendment thereof was the lien thereby created by operation of law. See Beatty v. Cook, 192 Iowa 542, 185 N.W. 360. The lien thus created was inseparably connected with the judgment and the Legislature had no power to impair it. Massingill v. Downs, 7 How. 760, 48 U.S. 760, 12 L.Ed. 903. Considered in the sense of a remedy for the enforcement of the judgment, such remedy was nevertheless a part of the obligation of the contract and subject to constitutional protection against impairment. Gunn v. Barry, 15 Wall. 610, 82 U.S. 610, 21 L.Ed. 212."

[13, 14] An award for industrial injuries has all the semblances of a judgment of a court at law and should be governed by these same rules. If a judgment is a contract within the contemplation of the federal Constitution it would seem to follow that an award of the Industrial Accident Commission would enjoy the same constitutional protection. All authorities from other states which have been called to our attention support the rule that such awards are to be governed by the law in force at the time of the injury. Lynch v. State, 19 Wash.2d 802, 145 P.2d 265; Preveslin v. Derby & Ansonia Developing Co., 112 Conn. 129, 151 A. 518, 70 A.L.R. 1426;

Gauthier v. Penobscot Chemical Fiber Co., 120 Me. 73, 113 A. 32; Neglia v. Zimmerman, 237 N.Y. 131, 142 N.E. 442; Associated Employers' Reciprocal v. Brown, Tex.Civ.App., 56 S.W.2d 483; Virden v. Smith, 46 Nev. 208, 210 P. 129.

[15] It should not be understood that we hold that the rule of the Schmidt case should be rejected because of these authorities. The conflict is emphasized to illustrate the application of these accepted rules of law—that when two interpretations of a statute are possible, one valid the other invalid, the courts will accept the construction in favor of the validity; secondly, when there is serious doubt at the time the legislation is passed whether it could be made retroactive the legislature will be presumed to have intended that it should be prospective only.

[16, 17] The same confusion relating to the power of the legislature to increase the preexisting awards is caused by the arguments of counsel for respondent and amici curiae that because the increase was in the interest of the public welfare and hence an exercise of the police power of the state, the legislation is not controlled by the limitations in the federal Constitution. In this argument respondent is supported by and it relies upon certain language found in Schmidt v. Wolf Contracting Co., supra, which indicates that the New York court might have had the same view. In support of that language the New York Court cited New York Central R. Co. v. White, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667, L.R.A. 1917D, 1, Ann.Cas. 1917D, 629. That case, however, does not support the statement. To the contrary the supreme court in Panhandle Eastern Pipe Line Co. v. State Highway Comm., 294 U.S. 613, 55 S.Ct. 563, page 567, 79 L.Ed. 1090, at 1097, declared in no uncertain terms that: "The police power of a state, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the state to protect its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire."

This holding is in harmony with that canon of constitutional construction that the Constitution of the United States is a limitation upon the power of the various states. This power was exercised most effectively in the adoption of the 14th amendment to the federal Constitution, and it would be a travesty on the use of the clear language of the amendment to hold that notwithstanding its provisions, any state could, by a simple declaration that the legislation was in the interest of public health, safety, or welfare, enact a statute in derogation of that constitutional limitation. However, whether in a case depending wholly on the question of power we would have to decide that the power does not exist to increase or decrease pre-existing awards, we do not have to decide that in this case. The question of intention not to make the amendment retroactive is decisive of this case. But, because of the confusion and uncertainty as to the legislative power, the legislature must be presumed to have refrained from attempting to exercise a doubtful power and to have chosen to exercise the safe and conceded power to make the statute prospective only.

The awards in each of the above numbered petitions are annulled.

GOODELL and DOOLING, JJ., concur.

COLUMBIA STEEL COMPANY, a Corporation, Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION of State of California and Paul B. Barker, Respondents.*

Civ. 13170.

District Court of Appeal, First District, Division 2, California.

Nov. 7, 1946.

Rehearing Denied Dec. 7, 1946.

Hearing Granted Dec. 26, 1946.

Walter Shelton and A. Terkel, both of San Francisco, for petitioner.

R. C. McKellips, of San Francisco, and John A. Rowe, Jr., of Los Angeles, for respondent Industrial Accident Commission.

NOURSE, Presiding Justice.

This petition for writ of review presents the same questions considered in Ætna Casualty and Surety Co. v. Industrial Accident Commission, Cal.App., 174 P.2d 41, with these exceptions: The employee was injured on September 6, 1941, and received compensation and medical care until September 22, 1942, when he returned to his employment. On June 26, 1945, he filed an application for adjustment, claiming both temporary and permanent disability. On January 9, 1946, the respondent made an award calling for increased payments under the terms of the 1945 amendment to section 4661 of the Labor Code.

The petition presents a more striking case than the others for the attack upon the validity of retroactive legislation of this character, but as we have said in the former opinion it is not necessary to decide this question at this time. It is sufficient that all that has been said therein relating to the question of the legislative intent is applicable here and those conclusions control the disposition of this case.

The award is annulled.

GOODELL and DOOLING, JJ., concur.

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* Subsequent opinion 182 P.2d 178.

BETHLEHEM STEEL COMPANY, a Corporation, Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION of State of California and Carl Zdechlik, Respondents.*

Civ. 13204.

District Court of Appeal, First District, Division 2, California.

Nov. 7, 1946.

Rehearing Denied Dec. 7, 1946.

Hearing Granted Dec. 26, 1946.

R. P. Wisecarver, of San Francisco, for petitioner.

R. C. McKellips and John A. Rowe, Jr., both of San Francisco, for respondent Industrial Accident Commission.

NOURSE, Presiding Justice.

The petition for a writ of review herein presents the same questions considered in Ætna Casualty and Surety Co. v. Industrial Accident Commission, Cal.App., 174 P.2d 41, with the exception that the employer herein was permissibly uninsured under the terms of section 3700 of the Labor Code. This factor applies only to the question whether the legislature had constitutional power to declare section 4661 of the Labor Code retroactive. Since we have held in the former decision that the legislature did not elect to make the section retroactive, the award herein is controlled by what is said in the former opinion on that subject.

For the reasons there stated the award is annulled.

GOODELL and DOOLING JJ., concur.

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* Subsequent opinion 182 P.2d 177.

29 Cal.2d 208

ANDREWS v. SUPERIOR COURT OF SAN JOAQUIN COUNTY et al.

Sac. 5714.

Supreme Court of California, in Bank.
Nov. 4, 1946.

As Amended Dec. 2, 1946.

1. Courts 🔑42(5)

Constitutional provision authorizing cities to provide by charter for the constitution, regulation, government, and jurisdiction of police courts, was not intended to authorize cities, by charter provision, to confer jurisdiction, either exclusive or concurrent, on police courts to administer the juvenile court law, the administration of which has rested in the superior court, acting as a juvenile court, ever since its inception. Welfare and Institutions Code, § 550 et seq.; Const. art. 11, § 8½, subd. 1.

2. Infants 🔑18

The juvenile court has jurisdiction of a violation of statute dealing with the contributing to the delinquency of a minor, and, if a guilty plea is made, the juvenile court imposes the sentence, but, if the plea is not guilty, the superior court has jurisdiction to try the defendant. Welfare and Institutions Code, §§ 550 et seq., 702.

3. Courts 🔑187

Criminal law 🔑90(1)

Police courts of cities traditionally are inferior courts and have been so defined by the Legislature. Pen.Code, § 1461.

4. Courts 🔑472(1)

Generally, the grant of original jurisdiction to a particular court of a certain class of cases, without any words excluding other courts from exercising jurisdiction in the same cases, does not necessarily deprive other courts of concurrent jurisdiction in such cases.

5. Infants 🔑20

In prosecutions under Juvenile Court Law for contributing to the delinquency of a minor, a defendant must be duly arraigned and plead to the charge in the manner provided in the Penal Code upon an indictment or information, thus indicating superior court procedure. Welfare and Institutions Code, § 702.

6. Infants 🔑18

Police court of the City of Stockton was without jurisdiction of charge against adult for contributing to the delinquency of a minor, whether adult pleaded guilty or not guilty. Welfare and Institutions Code, § 702; St.1923, p. 1371, art. 21, § 1; St.1927, p. 2151, art. 21, § 3.

7. Courts 🔑209(2)

Where, though motion to correct judgment of police court referred to controversy whether or not a plea of guilty was made in the first instance in the police court, it was based on all records in the case, and such records showed on their face that police court had no jurisdiction, Supreme Court deemed it proper to treat motion as raising the issue of jurisdiction of the police court.

8. Mandamus 🔑4(4)

Since no appeal lay from Supreme Court's action in denying petitioner's motion to correct police court's void judgment imposing sentence on petitioner for contributing to the delinquency of a minor, and since there was no other adequate remedy available to petitioner, mandamus to compel superior court to vacate and expunge the judgment was a proper remedy.

9. Judgment 🔑346, 382, 486(1)

A judgment absolutely void may be attacked anywhere, directly or collaterally, whenever it presents itself, either by parties or by strangers.

EDMONDS, J., dissenting.

Mandamus proceeding by John Andrews, petitioner, against the Superior Court of San Joaquin County and another, respondents, to compel the Superior Court to reverse an order of a police court refusing to correct a judgment, and to direct the police court to strike the judgment from its record.

Writ granted.

Alfred J. Hennessy and Peter Wedvig, both of San Francisco, for petitioner.

Joseph C. Tope, City Atty., and H. C. Stanley, Asst. City Atty., both of Stockton, for respondents.

CARTER, Justice.

Petitioner, John Andrews, was charged in 1935 by a complaint filed in the Police Court of the City of Stockton with contributing to the delinquency of a minor, a violation of the Juvenile Court Law, Stats. 1915, p. 1225, § 21, now Welfare & Institutions Code, § 702. He pleaded guilty (there is a dispute in that regard) to the charge and was given a jail sentence the execution of which was suspended on condition that he leave the city of Stockton.

The Police Court of Stockton was established by the charter of that city and, by that instrument, "is vested with all judicial powers granted by law to police courts of chartered municipalities." Stockton Charter, art. XXI, § 1, Stats.1923, p. 1371. And "Said police court shall have exclusive jurisdiction of all misdemeanors punishable by fine or by imprisonment or by both such fine and imprisonment committed within the corporate limits of the city. It shall also have exclusive jurisdiction of all actions for the recovery of any fines, penalties or forfeitures prescribed for the breach of any ordinance of the city, of all actions founded upon any obligation or liability created by any ordinance and of all prosecutions for any violation of any ordinance. Said police court shall have jurisdiction, in all civil cases, concurrently with the justices' court of all actions and proceedings arising within the corporate limits of the city and which might be tried in such justices' court." Stockton Charter, art. XXI, § 3, as amended, Stats.1927, p. 2151; see In re Lovall, 207 Cal. 544, 279 P. 452. Presumably the court was created pursuant to the following constitutional provision:

"It shall be competent, in all charters framed under the authority given by section eight of this article, to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State as follows:

"1. *For the constitution, regulation, government, and jurisdiction of police courts,* and for the manner in which, the times at which, and the terms for which the judges of such courts shall be elected or appointed, and for the qualifications and compensation of said judges and of their clerks and attaches; and for the establishment, constitution, regulation, government and jurisdiction of municipal courts and judges thereof, with such civil, criminal and magisterial jurisdiction as by law may be conferred upon inferior courts and judges thereof; and for the manner in which, the times at which and the terms for which the judges of such courts shall be elected or appointed, and for the qualifications and compensation of said judges and of their clerks and attaches; provided, such municipal courts shall never be deprived of the jurisdiction given inferior courts created by general law.

"In any city or any city and county, when such municipal court has been established, there shall be no other court inferior to the superior court; and pending actions, trials, and all pending business of inferior courts within the territory of such city or city and county, upon the establishment of any such municipal court, shall be and become pending in such municipal court, and all records of such inferior courts shall thereupon be and become the records of such municipal court." (Emphasis added.) Cal.Const. art. XI, § 8½(1).

[1-3] We do not believe that the foregoing constitutional provision was intended to authorize cities, by charter provision, to confer jurisdiction, either exclusive or concurrent, upon police courts to administer the juvenile court law, a field of law, the administration of which has rested in the superior court acting as a juvenile court ever since its inception. Manifestly it was the intent of the juvenile court law to vest exclusive jurisdiction in the superior court. The first juvenile court law was adopted in 1903, Stats.1903, p. 44. At that time the "juvenile court" was either the superior court or the justice or police court, Stats. 1903, p. 44, § 7, but no provision was made for the offense of contributing to the delinquency of a minor, the offense here involved. That act was completely revised

by amendment in 1905, Stats.1905, p. 806, but with no change here pertinent. The 1903 act was repealed in 1909 and a new act adopted, Stats.1909, p. 213, known as the "Juvenile Court Law." It was there declared that the superior court should exercise the jurisdiction conferred thereby and when so acting should be designated the juvenile court. No mention was made of justices' or police courts other than to require them to certify minors charged with crime to the superior court, and a retransfer to the inferior court in event the case was not a proper one for the juvenile court. Contributing to the delinquency of a minor was declared a misdemeanor and the *"juvenile court shall have jurisdiction of all such misdemeanors."* (Italics added.) Stats.1909, p. 225, § 26. These provisions remain substantially the same. The 1909 act was replaced in 1915. Stats.1915, p. 1225. In 1921 an amendment was made reading (after conferring jurisdiction on the superior court in cases of contributing to the delinquency of a minor): "The said court shall in all prosecutions under this section, cause the defendant to be duly arraigned and plead to the charge made against him in the manner provided in the Penal Code of the State of California upon an indictment or information; and the said court shall also have jurisdiction in all cases where the defendant prosecuted under this section shall enter a plea of guilty to impose sentence or in its discretion to grant probation upon such terms as it may deem proper." Stats.1915, p. 1225, § 21, as amended, Stats.1921, p. 773. In 1937 most of the provisions of the 1921 act were repealed and reenacted in the Welfare and Institutions Code. Stats.1937, p. 1181, Welfare & Institutions Code, §§ 550 et seq., § 702, contains the provision here pertinent. It has been repeatedly stated or assumed that the superior court sitting as a juvenile court has exclusive jurisdiction in juvenile court law matters and especially of cases involving contributing to the delinquency of a minor. People v. Scott, 24 Cal.2d 774, 151 P.2d 517; Matter of Maginnis, 162 Cal. 200, 121 P. 723; In re Gamo, 122 Cal.App. 725, 10 P.2d 770; 14 Cal.Jur. 136 et seq. Although by reason of the wording of section 1462 of the Penal Code, at one time it was held, that the municipal courts had jurisdiction of the offense here considered (In re Leach & Huggins, 99 Cal.App. 645, 279 P. 157), the Legislature amended that section to except juvenile court law cases from the jurisdiction of municipal courts, Stats.1929, p. 837, and since then they do not have such jurisdiction. In re Gamo, 122 Cal.App. 725, 10 P.2d 770. The juvenile court has jurisdiction of a violation of section 702 of the Welfare and Institutions Code (contributing to the delinquency of a minor), and if a guilty plea is made, that court imposes the sentence but if the plea is not guilty the superior court has jurisdiction to try the defendant. People v. Scott, supra; People v. Superior Court, 104 Cal.App. 276, 285 P. 871; In re Gamo, supra. It is of some significance that the police courts traditionally are inferior courts and have been so defined by the Legislature as follows: "The term 'police courts' as used in this and the succeeding chapter, includes police judges' courts, police courts and all courts held by mayors or recorders in incorporated cities or towns; provided, that while hearing and disposing of cases of which such police courts have concurrent jurisdiction with justices' courts, said police courts shall function as police courts and not as justices' courts, and all fines collected in such cases shall be paid to the city treasurer of the city in which such court is located, as expressly provided in sections 1457 and 1570 of this code." Pen.Code, § 1461.

[4, 5] It may be true generally that the grant of original jurisdiction to a particular court of a certain class of cases, without any words excluding other courts from exercising jurisdiction in the same cases, does not necessarily deprive other courts of concurrent jurisdiction in such cases (see Hopkins v. Anderson, 218 Cal. 62, 21 P.2d 560; Courtwright v. Bear River & A. W. & M. Co., 30 Cal. 573; O'Callaghan v. Booth and Deal, 6 Cal. 63), but the whole machinery and structure of the Juvenile Court Law are geared to the superior court and that court as a juvenile court. In all prosecutions under section 702 it is required that defendant shall be duly arraigned and plead

to the charge in the manner provided in the Penal Code upon an indictment or information, thus indicating superior court procedure. Welf & Inst.Code, § 702; see People v. Budd, 24 Cal.App. 176, 140 P. 714; Gardner v. Superior Court, 19 Cal.App. 548, 126 P. 501; In re Sing, 13 Cal.App. 736, 110 P. 693. Although the charge in the instant case was against an adult (contributing to the delinquency of a minor) that offense is a part of the juvenile court law system which chiefly concerns minors. As said in Matter of Maginnis, supra, at page 204 of 162 Cal., at page 726 of 121 P.: "This is the purpose declared by the opening words of the title, viz., 'An act concerning dependent and delinquent minor children, providing for their care, custody and maintenance.' That the other 'purposes' pointed out by petitioner are *mere adjuncts to this main end—means to facilitate its proper accomplishment—seems to us perfectly clear.* The second purpose, as above stated, is to provide for 'the punishment of persons responsible for, or contributing to, the dependency or delinquency of children.' It needs no argument to show that the existence of dependent or delinquent children is detrimental to the best interests of the community. Ultimately, of course, the act seeks to prevent such dependency or delinquency. One method of doing this is to take the child out of the cutody of the person who has caused or permitted it to become dependent or delinquent. Another is to punish the person who is responsible for the condition which is sought to be cured. Both methods are directly related to the final purpose of protecting the growing generation from conditions detrimental to its welfare." (Italics added.)

It was intimated in Ex parte Dolan, 128 Cal. 460, 60 P. 1094, that the superior court and the police court might have concurrent jurisdiction in the field of law here considered, but the question was squarely settled to the contrary in In re Guzman, 45 Cal. App.2d 359, 114 P.2d 46. There defendant was convicted in the superior court of a violation of section 702 of the Welfare and Institutions Code and sought habeas corpus on the ground that the Police Court of Stockton (the same police court and charter provision here involved) had jurisdiction and not the superior court. The writ was denied, the court concluding in its opinion (at page 365 of 45 Cal.App.2d at page 49 of 114 P.2d): "We are of the opinion that the charter provision relied upon by petitioner is invalid to the extent that it purports to confer jurisdiction over this offense upon the police court of the city of Stockton, and hold that the superior court was the proper forum to hear and determine the cause."

[6] We conclude, therefore, that the police court was without jurisdiction of the offense with which petitioner was charged and it is immaterial whether he pleaded guilty or not guilty. In the former situation the superior court sitting as a juvenile court had jurisdiction to impose sentence. In the latter, the power rested in the superior court to try the case and impose sentence. Hence the judgment of the police court imposing sentence on petitioner was void.

The proceedings in this case were commenced with a motion in the police court to expunge the judgment, made some five years after it was entered. That motion was denied. No appeal was taken from the order of denial. Six months later petitioner commenced proceedings in the superior court in mandamus to compel the police court to expunge the judgment. The superior court denied relief and petitioner appealed. This court affirmed that judgment on the ground that the writ of mandamus could not be used as a substitute for appeal even though the remedy by appeal was lost by neglect. Andrews v. Police Court, 21 Cal.2d 479, 133 P.2d 398, 145 A.L.R. 1042. Thereupon petitioner moved in the police court for an order correcting the minutes and judgment to show that he did not enter a plea of guilty. The motion was denied and the order of denial affirmed on appeal to the superior court. Thereafter in a pleading denominated "petition for writ of mandate" in the District Court of Appeal petitioner sought to have the superior court "grant" his appeal (the appeal last mentioned). After the writ was denied by the District Court of Appeal this court granted a hearing and an alternative writ was granted. That is the proceeding now before us.

[7-9] Although the motion to correct the judgment referred to the controversy of whether or not a plea of guilty was made in the first instance in the police court it was based on all the records and files in the case. Among these records the complaint and the judgment (which were introduced) show on their face that the police court had no jurisdiction for the reasons above discussed. Under these circumstances we deem it proper to treat the motion as raising the issue of the jurisdiction of the court as did the former motion to vacate the judgment which was considered by this court in Andrews v. Police Court, supra. Petitioner duly appealed from the order of the police court denying his last motion and the order was affirmed, hence he is not using mandamus as a substitute for an appeal as he attempted to do in Andrews v. Police Court, supra. No appeal lies from the action of the superior court in this case and there is no other adequate remedy available to petitioner. See Redlands High Sch. Dist. v. Superior Court, 20 Cal.2d 348, 125 P.2d 490; Portnoy v. Superior Court, 20 Cal.2d 375, 125 P.2d 487. The judgment being void its status was, as stated in In re Estate of Pusey, 180 Cal. 368, 374, 181 P. 648, 650: "A judgment absolutely void * * * may be attacked anywhere, directly or collaterally, whenever it presents itself, either by parties or strangers. It is simply a nullity, and can be neither a basis nor evidence of any right whatever." Such being the status of the judgment of conviction imposed on petitioner in this case, no discretion rested in the court except to expunge it from the record, and the superior court had no alternative except to order the police court to strike the judgment. The writ of mandamus running to that court is the proper remedy. See People ex rel. Mulford v. Turner, 1 Cal. 143, 52 Am.Dec. 295; People ex rel. Field v. Turner, 1 Cal. 190.

Let a peremptory writ of mandate issue commanding the respondent to enter an order reversing the order of the police court denying the motion to correct its judgment (treated as a motion to vacate and expunge the judgment from the record) and directing the police court to strike the judgment from its record.

GIBSON, C. J., and SHENK, TRAYNOR, and SCHAUER, JJ., concurred.

EDMONDS, Justice (dissenting).

In my opinion, Andrews v. Police Court, 21 Cal.2d 479, 133 P.2d 398, 145 A.L.R. 1042, bars any relief to the petitioner and controls the disposition of the present proceeding.

As stated in the majority opinion, five years after the judgment of conviction was entered, Andrews moved in the police court to expunge it from the record. His motion was denied and he did not appeal. He then brought a mandamus proceeding in the superior court to compel that action. The superior court denied relief, and this court affirmed the judgment upon the ground that mandamus may not be used as a substitute for appeal, even if that remedy is lost by neglect. Andrews v. Police Court, supra.

Thereafter, petitioner moved in the police court for an order correcting the minutes and judgment to show that he did not enter a plea of guilty. The motion was denied and, upon appeal to the superior court, the order was affirmed. The petitioner then brought the present proceeding in mandamus to compel the superior court "to grant said appeal taken by petitioner from said police court to said superior court and have the proceedings, complaint, judgment and sentence stricken and expunged from the records of said police court." As alternative relief, Andrews asked that in the event the motion to expunge was denied, the record be corrected to show that the plea entered by him was to "being indiscreet."

The petition for a writ of mandamus does not exactly follow the motion made in the police court. By that motion, Andrews sought to correct the record to show the entry of a plea of "being indiscreet" rather than guilty and the settled statement on appeal specifies the same relief as the purpose of the motion. However, upon oral argument to the superior court, as noted in its memorandum of decision, Andrews sought, and by the present petition now seeks, the additional relief of having the entire record of the police court expunged upon the ground that it did not have jurisdiction over the offense.

The order now made directing the police court, by writ of mandate, to strike the judgment of conviction from its records, is reached by treating the motion of Andrews as one raising the issue of the jurisdiction of that court "as did the former motion to vacate the judgment which was considered by this court in Andrews v. Police Court, supra." It therefore affirmatively appears that, although the motion which is the basis of the present proceeding was to correct the minutes to show facts different from those standing of record, this court has ruled upon it as one raising the question of jurisdiction as an issue of law. This is precisely the motion which this court examined in its former decision.

No authority is cited to justify the present consideration of the motion upon grounds entirely different from those stated in the police court and in its changed form it is subject to the doctrine of res judicata. Stated broadly, the judgment of a court having jurisdiction, directly upon the point in controversy, is competent and conclusive as between the same parties and their privies. Panos v. Great Western Packing Co., 21 Cal.2d 636, 134 P.2d 242; Sutphin v. Speik, 15 Cal.2d 195, 99 P.2d 652, 101 P.2d 497; Todhunter v. Smith, 219 Cal. 690, 28 P.2d 916.

In the present proceeding, as the question for decision is posed in the majority opinion, Andrews again is endeavoring to use mandamus for the purpose of obtaining the relief which might have been accorded to him had he appealed from the order denying his motion to vacate the judgment. By its prior decision, this court held that he could not use mandamus as a substitute for an appeal, and the rule of res judicata stands squarely against him.

For these reasons, in my opinion, the judgment of the superior court denying the writ of mandate should be affirmed.

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76 Cal.App.2d 785

CHRYSLER MOTORS OF CALIFORNIA v. ROYAL INDEMNITY CO.

ROYAL INDEMNITY CO. v. HARTFORD ACCIDENT & INDEMNITY CO.

Civ. 51170.

District Court of Appeal, Second District, Division 3, California.
Nov. 15, 1946.

1. Compromise and settlement 🔑17(1)

A settlement of personal injury claim became presumptive evidence only of liability to claimant, which was subject to being overcome by proof.

2. Action 🔑6

Whether insured was liable for personal injuries and whether such liability was covered by particular liability policies were open questions which could be determined in action between liability insurers for declaration of their respective coverages.

3. Insurance 🔑435

Injuries to employees of subcontractor installing electrical equipment in factory, as result of negligent failure of factory employee to inform them sufficiently of how to disconnect electricity, were not within manufacturer's liability policy covering accidents occurring "by reason of" and during work let or sublet to independent contractors in connection with insured's business.

See Words and Phrases, Permanent Edition, for all other definitions of "By Reason Of".

4. Insurance 🔑435

A liability policy covering accidents occurring "by reason of and during the progress of" work let or sublet by insured to independent contractors would not cover accidents caused by negligence of insured's employees not engaged in or in connection with the described work.

5. Action 🔑6

In action between liability insurers for declaration of coverages under respective policies, evidence supported finding that failure of insured's employee to give employees of subcontractor installing electrical equipment sufficient information on how to disconnect electricity was negligent and solely caused accident to subcontractor's employees, so as to preclude liability on one policy.

6. Insurance ⚷435

Under liability policy excepting injuries caused by insured's employee engaged "on or in connection with" work covered by the policy, acts of insured's employee in course of which he gave subcontractor's employees insufficient information on how to disconnect electricity were "in connection with" electrical installation work being performed by subcontractor, regardless of whether such acts were of direct physical or of supervisory character, and resulting accident to subcontractor's employees was within the exception.

See Words and Phrases, Permanent Edition, for all other definitions of "In Connection With".

7. Insurance ⚷435

Installation of suitable electrical equipment, controllable through a panel board, was necessary to business of automobile manufacturer and assembler, and hence injuries to employees of subcontractor installing such equipment was within coverage of manufacturer's liability policy defining "hazards" as including all operations necessary or incidental to insured's business.

See Words and Phrases, Permanent Edition, for all other definitions of "Hazard".

8. Insurance ⚷435

Liability of manufacturer and assembler of automobiles to employees of subcontractor installing electrical equipment in factory, based on failure of manufacturer's employee to give subcontractor's employees sufficient information on how to disconnect electricity, did not "arise out of" work let or sublet to independent contractors within terms of manufacturer's liability policy excepting hazards thus arising.

See Words and Phrases, Permanent Edition, for all other definitions of "Arise Out Of".

Appeals from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by Chrysler Motors of California against the Royal Indemnity Company, wherein defendant filed cross-complaint against the Hartford Accident & Indemnity Company, for declaration of coverages under liability insurance policies. From judgments in favor of defendant, plaintiff and cross-defendant appeal.

Affirmed.

Wright and Millikan, of Los Angeles, for appellants.

Tripp, Callaway, Sampson & Dryden, of Los Angeles, for respondent.

KINCAID, Justice pro tem.

In this action separate appeals have been taken by Chrysler Motors of California, a corporation, hereinafter called "Chrysler," from the judgment in favor of defendant Royal Indemnity Company, a corporation, hereinafter called "Royal," on the complaint and answer herein, and by Hartford Accident and Indemnity Company, a corporation, hereinafter called "Hartford," from the judgment in favor of Royal on its cross-complaint and the answer thereto.

Prior to the commencement of this action Royal and Hartford each issued a liability policy of insurance to Chrysler. Following the happening of certain incidents, which will be hereinafter more fully described, Chrysler, while a trial before a jury was in progress, compromised a negligence action against it for personal injuries by B. R. Miller and N. G. Callahan, and settled their claims by the payment of $18,317.09. Royal and Hartford, questioning liability for payment of these claims under the insurance coverage provided by their respective policies, entered into an agreement in writing with Chrysler by the terms of which they each reimbursed such insured for one-half its outlay in settling said claims and agreed that either insurance company might sue the other, in the name of Chrysler, to obtain a judicial declaration of the respective coverages under such polices. Hartford elected to bring such a suit and filed this action in the name of Chrysler. Royal answered and cross-complained against Hartford. At the trial of the action it was determined that Royal's policy did not but that Hartford's policy did cover the liability represented by the payment of such claims, and judgment was therefore entered in favor of Royal against Hartford for the amount of money paid Chrysler by Royal.

The evidence as to the facts of the accident wherein Miller and Callahan were injured and which led to their suit against Chrysler is somewhat conflicting, but, viewed most favorably in support of the judgment it is, in effect, as follows: In April, 1939, Chrysler engaged the Bandini Estate Company to do certain construction and alteration work in connection with its Los Angeles plant. Certain sub-contracts were entered into by the latter company for electrical work with a sub-contractor, Wm. P. Neil Company, Ltd. The work performed by Neil was partly under its contract with Bandini and partly under an arrangement directly with Chrysler. Neil sub-contracted certain electrical work to Henderson Electrical Company, by whom one Hollingsworth was employed as foreman and Miller and Callahan as electricians. Lawrence E. Duncan was employed by Chrysler in charge of electrical maintenance of its factory and during the course of the construction and alteration work, and as a part of his duties, he was required to and did lay out much of the detail of the electrical work which was being done by the sub-contractors. Duncan supplied most of the information as to the manner, time and place that such work was to be performed.

The accident out of which the action against Chrysler arose occurred August 11, 1939. Callahan, Miller and Hollingsworth were burned by an electrical flash fire which was produced when Miller, in the course of his work in connecting up a panel control board, laid a steel tool across bus bars at the back of such board. This was an unusual type of panel control board, in that the pulling of one switch did not shut off the electrical current from the entire board but in addition to such switch certain "disconnects" were placed some 10 or 11 feet off the ground behind closed doors and had to be separately operated in addition to the switch in order to completely kill the current on the entire board. These facts were not known to Hollingsworth, Miller or Callahan, and on the day of the accident, in order to work thereon, Hollingsworth asked Duncan how to kill the board. The latter, with full knowledge of the subject, told him to pull the specific switch that stuck out in front of the board on the left-hand side, but failed to advise him of the necessity of operating the disconnects that were behind the doors above. Hollingsworth pulled the indicated switch and in the belief that the electrical current on the entire board was killed the three men went to work. The lower busses were tested, found to be without current and one cable was thereupon put in place. While a second cable was being installed, a tool in the hands of Miller came in contact with the top bus bar which was still charged with electricity and the flash fire and injuries resulted.

[1, 2] The question of the responsibility of Chrysler for the injuries sustained by Miller and Callahan was never determined in their suit due to the fact that it was settled out of court. Such settlement becomes presumptive evidence only of the liability of Chrysler, which presumption is subject to being overcome by proof in the instant action. Under such circumstances the questions as to the liability of the insured and whether such liability was covered by the contracts of insurance are still open and may be litigated and determined in this action. Lamb v. Belt Casualty Co., 1935, 3 Cal.App.2d 624, 631, 40 P.2d 311; St. Louis Dressed Beef & Provision Co. v. Maryland Cas. Co., 1906, 201 U.S. 173, 26 S.Ct. 400, 50 L.Ed. 712; Butler Bros. v. American Fidelity Co., 1913, 120 Minn. 157, 139 N.W. 355, 44 L.R.A.,N.S., 609.

The trial judge in the instant case, upon all of the evidence herein including the character of the employment of the injured parties and Duncan, the circumstances under which the injuries were sustained, and the terms of the respective insurance policies, made its specific findings that Royal was under no obligation to defend the action of Miller and Callahan against Chrysler nor to indemnify such insured against liability thereon because the accident through which the injuries were sustained did not occur by reason of and during work let or sublet to independent contractors in connection with the conduct of Chrysler's business within the meaning of the policy of insurance issued by Royal. The court then further found that the accident in question occurred and was caused solely by reason of the negligent acts of Chrysler's employee Duncan, performed in the course of operations necessary and incidental to the conduct of his employer's business, the insurance liability for which was included in and covered by the Hartford policy but was excluded from and not covered by the Royal policy. Appellants' contentions that these findings are erroneous will be taken up in the order in which they appear.

Liability Under the Royal Policy.

On September 30, 1938, Royal issued a policy of insurance to Chrysler by the terms of which it agreed that if, within the period of one year, "any person or persons shall sustain any bodily injuries by accident, whether resulting fatally or otherwise, by reason of and during the progress of the work described in Statement 4 of the Schedule, which work has been let or sublet by the Insured to independent Contractors or independent Sub-contractors, and for which injuries the Insured is liable for damages, then the company will indemnify the insured against loss arising out of such liability * * *." The work under statement 4 is described as "work performed for the insured under contract [in] connection with the construction of additional units and all other construction work and/or the making of changes on or installation of equipment," and the location of all places where such work is to be done includes "Los Angeles, California." As a specific condition the policy provides that it does not cover "3. (c) Any liability in respect of injuries caused or sustained by any employe or employes of the Insured engaged on, or in connection with the work covered by this Policy."

[3, 4] The trial court was correct, in the light of the evidence herein, in finding that the accident, by virtue of which subcontractor Henderson's employees were injured, did not occur *by reason of and* during work let or sub-let to independent contractors in connection with the conduct of Chrysler's business within the meaning of the policy of insurance issued by Royal. Under the language of the insurance contract coverage is not established by merely showing that the accident occurred during the work so let or sub-let but, in addition thereto, the proof must disclose that it occurred *by reason* thereof. The injuries to Miller and Callahan were not sustained by reason of the work which they were performing for their sub-contractor employer, even though they were injured in the performance of such work. While it is true that the accident would not have happened had they not been so engaged, the work itself was not the cause of its happening. It was Chrysler's own negligence, through the agency of its employee Duncan, which was the cause, and, under such circumstances liability is not imposed upon Royal under the terms of its insurance contract. Michigan Stamping Co. v. Michigan Employers' Casualty Co., 1926, 235 Mich. 4, 209 N.W. 104; Thompson-Starrett Co., Inc. v. Otis Elevator Co., 1936, 271 N.Y. 36, 2 N.E.2d 35. Appellants' contention that the policy covers accidents of the kind here in question even though caused by the negligence of Chrysler's employees, excepting only when caused by such of them as were engaged on or in connection with the work covered by this policy, is without merit.

[5, 6] The next finding of the trial court to which objection is made is that Royal is absolved from liability under its policy due to the fact that the accident occurred and was caused solely by reason of the negligent acts of Chrysler's employee Duncan, performed in the course of operations necessary and incidental to the conduct of his employer's business. The evidence amply supports the finding that Duncan's acts were negligent and solely caused the accident. Appellants argue, however, that the second half of this finding is not so supported and that in order for the acts of Duncan to fall within the exclusion provided by condition 3(c), hereinbefore quoted, he must have been engaged *on the work* to

be performed under contract by an independent or sub-contractor. They point out that the work let or sublet did not include the laying out of jobs to be done, the inspection and checking of such work as it progressed, and the direction and supervision thereof from time to time by any representative of Chrysler. While it may be conceded that such acts on the part of Duncan were not direct work so let or sublet, appellants overlook the additional words "or in connection with" which constitute an added exception requiring consideration. As provided by the quoted condition Royal is absolved from liability for injuries caused by any employee of Chrysler *engaged on, or in connection with the work* covered by the policy. The acts of Duncan, as disclosed by the evidence, were most certainly in connection with the work being performed by sub-contractor Henderson for the insured, within the terms of the Royal policy, and, being so connected, it is immaterial as to whether the acts and services so performed by him were of a direct physical or of a supervisory character. It therefore necessarily follows that Royal was under no obligation to defend the suit against Chrysler by the injured men nor to indemnify the insured against liability therefor.

Liability Under Hartford Policy.

On October 19, 1939, Hartford issued a policy of insurance to Chrysler wherein it agreed "I. Bodily Injury Liability. To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the hazards hereinafter defined in respect of which the Insured has selected Bodily Injury Liability coverage as evidenced by the entry in the Bodily Injury Column provided therefor in the Declarations.

"Definition of Hazards Coverage A—Owners, Landlords and Tenants and Manufacturers and Contractors Liability. The existence, maintenance or use of property in connection with the conduct of the named Insured's business described in the Declarations, all operations which are necessary or incidental thereto, and the prosecution of the Insured's business operations, but excluding liability arising out of any of the hazards hereinafter defined."

Coverages B to G then follow, B being the only one having any pertinency to the issues here presented.

"Coverage B—Owners and Contractors Protective Liability. All work let or sublet to independent contractors in connection with the conduct of the named Insured's business described in the Declarations."

As to coverage B, however, the policy stipulated that liability under such clause would not become effective until October 7, 1939, which is the date of the expiration of Royal's policy hereinabove described. The remaining coverage of Hartford's policy was to be effective from June 27, 1939, to June 27, 1940. As previously stated the accident in question occurred August 11, 1939.

Appellant Hartford contends that, under the terms of its policy and all the evidence herein, it is not liable to its assured Chrysler: (1) Under Coverage A because of the fact that liability arising out of the hazards of work let or sublet to independent contractors was specifically and expressly excluded from the coverage provided by A; and (2) under the provisions of Coverage B for the reason that the protection offered by this clause did not become effective until October 7, 1939, a date subsequent to the happening of the accident in which Miller and Callahan were injured.

Respondent readily concedes the second of Hartford's contentions concerning Coverage B, pointing out that the judgment herein was not predicated upon the provisions of that clause but was on the comprehensive coverage of the Hartford policy, including paragraph A, which was in full force and effect during the period when the injuries in question were sustained.

We proceed then to a consideration of the first point made by such appellant. Hartford concedes that it would be liable under the terms of the policy if it were not for the exclusion provision B concerning the hazard of work let or sublet to independent contractors. It then argues in support of its position that the parties to the insurance contract intended, by the use of the word "hazard" to exclude from coverage any of the possible sources of liability incident to work let or sublet to independent contractors, including injuries to the latter's employees, regardless of whether such injuries were caused by negligent acts of its own agents or by any other cause. Such a strained construction of the terms of the policy is neither necessary nor warranted. The policy excludes "liability arising out of any of the hazards hereinafter defined." It then proceeds to enumerate and define six such excepted hazards, including B. Nowhere does it say, as Hartford contends, "any of the hazards involved in * * * work let or sublet * * *."

The terms of the Hartford policy disclose a generally broad insurance coverage in that such insurer agrees to pay all sums which Chrysler becomes obligated to pay by reason of the liability imposed by law upon it for bodily injury caused by accident and arising out of the existence, maintenance or use of property in connection with the conduct of Chrysler's business, all operations which are necessary or incidental thereto, and the prosecution of its business operations, excepting only, as applicable to the facts herein, "liability arising out of the * * *" hazard defined as "All work let or sublet to independent contractors in connection with the conduct of * * *" Chrysler's business.

[7, 8] It seems readily apparent that the installation of suitable electrical equipment, controllable through a panel board, was necessary to the business of the insured as a manufacturer and assembler of automobiles and that the work being performed in connection therewith at the time of the accident, by both the injured parties and Duncan, was an operation incidental to its use. The sole remaining question then is whether the liability of Chrysler to Miller and Callahan, predicated upon the negligent acts of its agent Duncan while engaged in the course and scope of his employment, arose out of work let or sublet to independent contractors. The answer to this query is generally similar to that heretofore given in response to the claim of liability under Royal's policy agreement. The injuries were sustained and liability in Chrysler proximately resulted from the negligent acts of its employee Duncan and did not arise out of work let or sublet to anyone, even though happening in the performance of such work. The exclusion is not of persons working for an independent contractor but for liability arising out of work let or sublet to such contractor. Gulf Portland Cement Co. v. Globe Indemnity Co., 5 Cir., 1945, 149 F.2d 196; Thompson-Starrett Co., Inc. v. Otis Elevator Co., supra, 271 N.Y. 36, 2 N.E.2d 35; Triangle Waist Co. v. Gen'l. Acc. Fire & Life Assur. Corp., 1917, 177 App.Div. 904, 163 N.Y.S. 687. Hartford is therefore liable, under its policy of insurance, to indemnify Chrysler in the full amount of the settlement, and Royal is entitled to reimbursement from Hartford for its outlay of one-half thereof.

The judgment is affirmed.

DESMOND, P. J., and WOOD, J., concur.

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76 Cal.App.2d 758

MOORE v. STATE BOARD OF EQUALIZATION et al.

Civ. 12980.

District Court of Appeal, First District, Division 2, California.

Nov. 12, 1946.

Rehearing Denied Dec. 12, 1946.

1. Intoxicating liquors 🔑45

The statute governing suspension or revocation of liquor licenses recognizes and does not impair the plenary powers directly lodged with State Board of Equalization by the Constitution. Gen.Laws, Act 3796, §§ 38, 40 et seq.; Const. art. 20, § 22.

2. Intoxicating liquors 🔑106(1)

Both the Constitution and the Alcohol Beverage Control Act authorize revocation of liquor licenses by State Board of Equalization. Gen.Laws, Act 3796, §§ 38, 40 et seq.; Const. art. 20, § 22.

3. Intoxicating liquors ⚷106(4)

A rule of State Board of Equalization, providing for revocation of liquor license on conviction of buying or receiving stolen liquor or of violating price laws or regulations, was not improper as setting up rigid standards and foreclosing the Board from exercising discretion in individual cases. Const. art. 20, § 22.

4. Intoxicating liquors ⚷108(9)

A rule of State Board of Equalization providing for revocation of liquor license did not bind the Board to revoke in every case but included power to suspend.

5. Intoxicating liquors ⚷106(1)

The State Board of Equalization is not required to prescribe by rule what infraction or misconduct will put a liquor license in jeopardy. Const. art. 20, § 22.

6. Intoxicating liquors ⚷44

A liquor license is but a permit to do what would otherwise be unlawful.

7. Intoxicating liquors ⚷106(4)

Revocation of liquor licenses solely because of licensee's conviction of sale over ceiling price was not an abuse of discretion. Gen.Laws, Act 3796, §§ 38, 40 et seq.; Const. art. 20, § 22; Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

8. Intoxicating liquors ⚷106(2)

The Constitution confers power to revoke liquor license independently on State Board of Equalization, which is not restricted to statutory grounds but may take disciplinary action on other grounds within the Constitutional provision. Gen.Laws, Act 3796; Const. art. 20, § 22.

9. Intoxicating liquors ⚷106(2)

The State Board of Equalization could, by rule, enlarge statutory grounds for revocation of liquor licenses, where rule was authorized by constitutional and not merely statutory authority. Gen.Laws, Act 3796; Const. art. 20, § 22.

Appeal from Superior Court, San Francisco County; Sylvain J. Lazarus, Judge.

Petition by David Moore against the State Board of Equalization of the State of California for writ of mandate to compel vacation of order revoking liquor licenses. From an order denying a peremptory writ, petitioner appeals.

Affirmed.

Edward Dienstag and Cerf, Robinson & Leland, all of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for respondent.

GOODELL, Justice.

The appellant sought by mandate to compel the respondents to vacate their order revoking his licenses. This appeal was taken from the order denying a peremptory writ.

In January, 1944 two "off-sale" licenses were issued to appellant by the respondent board, authorizing the sale of wine, beer and distilled spirits for consumption off the licensee's premises. On March 4, 1944 an information was filed in the federal court charging appellant with a violation of the Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq., in having sold, on February 26, 1944, a quart bottle of whiskey for $8. when its "ceiling" price was $3.15. He pleaded guilty and was fined $500. and granted probation for one year.

On April 12, 1944, a complaint was filed with the board charging appellant with a violation of its rule 35, based on said conviction. A hearing was set for May 4 and notice thereof, accompanied by a copy of the complaint, was served on appellant. At the hearing the board introduced a certified record of said information and of the judgment of conviction and rested. Appellant's counsel then said: "We submit, and move for dismissal", to which the hearing officer replied that he had no authority to act on such a motion. Appellant's counsel responded "We have nothing to offer", and the matter was submitted.

Findings were filed, with the recommendation that the licenses be revoked, to which appellant filed objections. On June 2 the board unanimously approved the recommendation.

On June 7, 1944 appellant's petition for a writ of mandate was filed and an alternative writ issued. At the trial the only evidence introduced was the record before the board and a stipulation that appellant knew nothing of rule 35 until after his appearance in the federal court, that the rule had not been published, and that a copy of the board's rules (in effect in August, 1943) did not contain rule 35. The court decided in favor of the board.

In the meantime the appellant exhausted his administrative remedies by petitioning the board for a reconsideration, which was denied on July 18, 1944.

Rule 35 reads as follows: "After proceedings are duly had, pursuant to the provisions of Sections 40 and 45 of the Alcoholic Beverage Control Act, upon a complaint alleging, and a finding by the Board, that a licensee has been convicted of the offense of buying or receiving stolen alcoholic beverages or of a violation of the federal laws or regulations relating to ceiling prices for alcoholic beverages, the license of such licensee shall be revoked."

The appellant contends that the board has no power (1) to enlarge, by rule, the statutory grounds for revocation, or (2) to adopt, as its own, regulations which might be made from time to time by the Office of Price Administration; (3) that a violation of OPA regulations is not a public offense involving moral turpitude, and (4) that rule 35 was not promulgated as required by law. Thus it will be seen that the appellant's attack is based primarily on statutory grounds.

In their brief the respondents directly tendered issue on the following points but the appellant has refused a joinder thereon by failing to file a reply brief: (1st) That both the constitutional provision and the Alcoholic Beverage Control Act empower the board to revoke a license upon a determination that its continuance would be contrary to public welfare or morals; (2d) That the board is not restricted by many of the general doctrines relating to state-wide administrative agencies created by the legislature, but possesses more comprehensive power and discretion under the constitutional provision than is usual in this state; (3d) That the constitutional provision confers power independently upon the board which power the legislature cannot restrict or diminish, and (4th) That the board is not restricted in revoking a license to the grounds stated in the act, but may take disciplinary action on other grounds within the constitutional provision.

Section 22 of article XX of the state Constitution reads: "* * * The State Board of Equalization shall have the exclusive power to license the * * * sale of intoxicating liquors in this State, * * * and shall have the power, in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause the granting or continuance of such license would be contrary to public welfare or morals."

The Alcoholic Beverage Control Act, Stats.1935, p. 1123, 2 Deering's General Laws 1944, Act 3796, p. 1353, was enacted seven months after this amendment had laid the foundation for such legislation. In its 180-odd sections it contains a wide variety of provisions relating to alcoholic beverages and kindred subjects and vests in the board, by virtue of the underlying constitutional authority, numerous powers and functions.

Section 38 of the act provides, "The board shall administer all of the provisions of this act and to that end shall prescribe all necessary rules and regulations to carry out such provisions * * *." Section 40 et seq. provide for complaints, notice, hearing, findings, recommendation, decision and rehearing by the board, and for court review.

Section 40 prescribes among the "grounds which constitute a basis for the suspension or the revocation of licenses" that "When the continuance of such license would be contrary to public welfare or morals; but proceedings under section 40 upon this ground shall not be deemed a limitation upon the board's authority to proceed under Article XX, section 22 of the Constitution of this State."

[1] It will be observed that the first phrase was lifted bodily out of section 22 of article XX. It is noteworthy, also, that by the last phrase the legislature definitely recognized the plenary powers directly lodged with the board by the Constitution. See Irvine v. State Board of Equalization, 40 Cal.App.2d 280, 285, 286, 104 P.2d 847.

[2] It is clear, therefore, that, as contended by the Attorney General in his first point, both the Constitution and the act authorize revocation by the board.

The complaint before the board notified the appellant that the proceedings were taken under article XX, section 22 of the State Constitution.

Since the briefing of this appeal the Supreme Court has decided the companion cases of Covert v. State Board of Equalization, 29 Cal.2d 125, 173 P.2d 545, and Reynolds v. State Board of Equalization, 29 Cal.2d 137, 173 P.2d 551, in both of which the board's action was taken, as it was here, in the exercise of its constitutional powers and not under the Alcoholic Beverage Control Act.

In the Covert case, [29 Cal.2d 125, 173 P.2d 548] the petitioner, a citizen of Glendale, filed a complaint with the board asking that it revoke the liquor license of one McMillan on the ground that his cafe was a public saloon and not a bona fide restaurant. After a hearing the board concluded that the evidence did not establish a violation and dismissed the complaint. Covert then went into the Superior Court in a mandate proceeding and that court reweighed the evidence before the board, made new findings to the effect that the principal business of the cafe was the sale of intoxicating liquors and that the serving of food was a pretense and a sham in order to give the business the appearance of a restaurant, and issued a peremptory writ directing the board to revoke the license.

That judgment was reversed, the Supreme Court holding, inter alia, that the board "is given its liquor control authority directly by the Constitution." The difference between powers given to an administrative agency by the Constitution and those given to it by statute (urged as the Attorney General's second point) is clearly pointed out in the opinion. Therein the court says: "An examination of the Constitution of California shows that the State Board of Equalization, unlike most other agencies of statewide authority (see Laisne v. California State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457), has specifically been given quasi judicial, or adjudicating power, that is, the right to make determinations of fact which are not subject to reexamination in a trial de novo in the superior court."

After quoting section 22 of article XX the opinion continues: "In order to revoke a license the board obviously must examine the facts, resolve any conflicts in the evidence, and exercise its judgment with respect thereto. A revocation may be only 'for good cause,' and, accordingly, the board must afford an opportunity for a full hearing, an essential element of a quasi judicial proceeding. [Citations]. This does not mean, of course, that the 'discretion' given to the board is absolute, since it must be exercised in accordance with the law.

"The functions of the board are thus similar in some respects to those of a local administrative tribunal, a decision of which will be sustained if it has committed no error of law and if the evidence, although conflicting, is sufficient to support its findings of fact [Citations] * * *." Further the court says:

"It would appear, therefore, from the foregoing authorities, that the decisions of the board are final, subject to review for excess of jurisdiction, errors of law, abuse of discretion and insufficiency of the evidence, and that where there is error the matter ordinarily should be remanded to the board for further proceedings. * * *"

In holding that "the board must afford an opportunity for a full hearing" the Covert case reaffirms what the Irvine case held in that regard. The procedural machinery leading up to and surrounding such hearing is supplied by section 40 et seq. of the act without impairing the board's constitutional powers. Irvine case, supra, at pages 285, 286 of 40 Cal.App.2d, 104 P.2d 847. Indeed in the drafting of rule 35 the board recognized that such procedure should be followed. An examination of the record shows that in the instant case the board followed such procedure and from what was said earlier it is clear that appellant unquestionably was afforded an opportunity for a full hearing. No claim is made to the contrary. At that hearing he had "nothing to offer". Moreover, the board acted with deliberation, for more than three months elapsed from accusation to final board action.

[3, 4] The only attack which might be said to question the proper exercise of the board's discretion in the instant case is appellant's claim that rule 35 set up a rigid standard which bound the board in advance to be guided by any and every regulation which the OPA might turn out touching liquor prices, thereby foreclosing itself from exercising discretion in individual cases. We cannot follow this argument, for it is clear that at a board hearing a licensee would have every opportunity, as this appellant had, to make a full showing by way of mitigation, excuse or avoidance, which showing of course would be addressed to the board's discretion in the particular case. Appellant's additional contention, that the rule bound the board to revoke in every case rather than suspend, is answered by the Reynolds case, supra, which holds that the power to revoke includes the power to suspend.

[5] There is nothing in the constitutional provision which requires the board to prescribe by rule what infraction or misconduct will put a license in jeopardy. It so happened in this instance that the board saw fit to adopt the rule in question some two months before appellant's licenses were even issued and over three months before he got into trouble. The fact that such a rule chanced to be adopted cannot possibly weaken the board's position. It indicates rather an attitude of fairness, by way of a declaration of board policy, if nothing else (see Bank of Italy v. Johnson, 200 Cal. 1, 22, 23, 251 P. 784) so that licensees might be forewarned.

[6, 7] A liquor license is "but a permit to do what would otherwise be unlawful". Irvine case, supra, at page 284 of 40 Cal.App.2d at page 850 of 104 P.2d; see, also Blatz Brewing Co. v. Collins, 69 Cal.App.2d 639, 643, 160 P.2d 37. These licenses, paradoxically enough, gave appellant the privilege of making the very sale by which he violated the Emergency Price Control Act. It was not as if he had violated a postal law or some other unrelated federal statute; his offense (as in Moskovitz v. City of St. Paul, 218 Minn. 543, 16 N.W.2d 745) was directly related to his liquor licenses.

Moreover by section 40, subd. 2, of the act the legislature has prescribed as grounds for revocation the violation by a licensee of the act itself, or of any rules or regulations adopted thereunder, or of "any other penal provisions of law of this State prohibiting or regulating the sale, exposing for sale, use, possession, giving away, adulteration, dilution, misbranding or mislabeling of alcoholic beverages or intoxicating liquors." The board might well have reasoned by analogy that if the violation of a state liquor law or regulation constituted good cause, the violation of a federal law, or regulation which dealt with the same subject should likewise constitute good cause for revocation.

We are satisfied that in revoking these licenses the board did not abuse its discretion.

[8] The Attorney General's third and fourth points, i. e., that the Constitution confers power independently on the board and that the board is not restricted in the revocation of a license to the grounds stated in the act, but may take disciplinary action on other grounds within the constitutional provision are amply sustained by the authorities including the Covert case. In the Irvine case, supra, it is said at page 285 of 40 Cal.App.2d, at page 850 of 104 P.2d: "The sections of the Alcoholic Beverage Control Act involved herein merely regulate procedure and are not designed to, nor do they in any way, impair the constitutional power of the Board of Equalization, nor do they even remotely attempt to regulate or define what jurisdiction the board shall possess." And further: "When legislative action prescribing a mode in which the board shall exercise its jurisdiction does not circumscribe

the latter's powers as derived from the Constitution, such procedural legislation does no violence to the jurisdiction of the board nor does it interfere with the discretion lodged in the board to control the issuance and cancellation of liquor licenses. It is only where the legislative action impairs the powers granted by the Constitution, or defeats the exercise of such powers, that it is without force or effect." In Hansen v. State Board of Equalization, 43 Cal.App.2d 176, 180, 110 P.2d 453, 455, (a case involving the granting of a license), it is said: "The constitutional provisions mentioned above are designed to give the board broad discretionary powers in the matter of granting or refusing to grant licenses of this character." We repeat, subdivision 1 of section 40 of the act covers, literally, the same ground as section 22 of article XX, leaving it to the board to say what shall be "contrary to public welfare or morals".

[9] The answer to appellant's first contention, i. e., that the board has no power to enlarge, by rule, the statutory grounds for revocation, is, as already indicated, that in adopting the rule the board did not rely on the rule-making provisions of section 38 of the act. The source of its power was section 22 of article XX. For that reason such cases as Whitcomb Hotel, Inc., v. California Employment Commission, 24 Cal.2d 753, 151 P.2d 233, 155 A.L.R. 405; First Industrial Loan Co. of California v. Daugherty, 26 Cal.2d 545, 159 P.2d 921, and Blatz Brewing Co. v. Collins, supra, 69 Cal.App.2d 639, 160 P.2d 37, which appellant cites, are not in point.

The second contention, i. e., that the board is without power to commit itself to OPA regulations which might be made from time to time, has been fully discussed and we think answered.

The appellant's third and fourth points, based entirely on the statute, have been answered by what has been already said herein.

The order denying a peremptory writ of mandate is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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76 Cal.App.2d 800

CASARETTO et al. v. DE LUCCHI et al.

Civ. 13012.

District Court of Appeal, First District, Division 1, California.

Nov. 18, 1946.

1. Pleading ⚿1

The function of pleadings is to inform the parties within reasonable limits of nature of the action pending and the issues involved, and it is not to create traps that will require a reversal for nonprejudicial error.

2. Appeal and error ⚿1039(1)
Pleading ⚿15

Although incorporating allegations of a separate and distinct pleading by reference might not have been a commendable method to plead, it could not be held reversible error where opposing party had both pleadings before him.

3. Set-off and counterclaim ⚿29(1)

Under statute as amended, it was not necessary that there be any connection between cause of action set up in complaint and that which formed basis of the counter-claim. Code Civ.Proc. § 438.

4. Action ⚿36
Sales ⚿354(6)

In action on common count to recover for meat allegedly sold and delivered by plaintiff to defendants, defense set forth in answer in which defendants allege that plaintiff delivered them meat but "overcharged" them some $7,000 was not a pleading of "fraud" as a defense, so as to support either of plaintiff's contentions that fraud was not properly pleaded and that such a defense converted the action into an equity action, since an overcharge could be based on mistake as well as fraud.

5. Equity ⚿11

Fraud is a peculiar object of equity jurisdiction, but where only relief asked is for damages, where no equitable relief or remedies are invoked, and where remedy for damages is not only adequate but speedy, the action is at law, and equity will refuse jurisdiction.

6. Equity 🔑11

Equity jurisdiction is not conferred by a mere charge of fraud made affirmatively or defensively.

7. Action 🔑24
Jury 🔑13(18)

In action on the common counts for meat sold and delivered a cross-complaint alleging that plaintiff had overcharged defendants $7,000 on deliveries made and asking for a money judgment for such amount did not invoke any equitable remedy or right, and entire cause was legal in nature and it was proper to submit all issues to jury.

8. War 🔑4

In action on common counts for meat allegedly sold where defendants filed a cross-complaint alleging that plaintiff delivered less meat than tags called for and collected red ration points for such meat never delivered with result that defendants overdrew their red point ration bank account and had their place of business closed down by the OPA, evidence concerning defendant's difficulties with OPA was within issues raised by the cross-complaint.

9. Trial 🔑329

A verdict awarding defendants $6,500 on their counter-claim was not erroneous on ground that it was in conflict with the pleadings and stipulation of the parties in that plaintiff sued defendants for $8,805.19 and defendants in their counter-claim alleged only that they were overcharged $7,000, where defendant's answers specifically denied that they owed plaintiff anything.

10. Stipulations 🔑14(3)

In action on common counts for meat allegedly sold, where defendants filed a counter-claim alleging that plaintiff delivered less meat than tags called for, a stipulation entered into by defendants during trial could not be construed as an admission that they had received all items of meat listed on the bill of particulars with the exception of a specific overcharge.

11. Sales 🔑359(1)
War 🔑4

In action on common counts for meat allegedly sold, where defendants filed a cross-complaint alleging that they were overcharged and that plaintiff collected red ration points for meat not delivered with result that defendants overdrew their ration bank account and had their place of business closed down by the OPA, evidence supported a judgment on verdict denying recovery on the complaint and awarding defendant $6,500 damages on their cross-complaint.

12. Appeal and error 🔑933(4)

Where plaintiff's motion for new trial was granted without specifying insufficiency of evidence as basis of his order, such ground would be disregarded on appeal from the order. Code Civ.Proc. § 657.

13. New trial 🔑76(1)

A new trial may not be granted on ground of excessive damages merely because verdict seems large, but only when it appears to have been given under the influence of passion or prejudice. Code Civ.Proc. § 657, subd. 5.

14. New trial 🔑76(1)

If evidence before trial court is conflicting and there is substantial evidence to sustain the award, no right to grant a new trial on ground of excessiveness of verdict exists where insufficiency of evidence is not specified as a ground of the order. Code Civ.Proc. § 657.

15. New trial 🔑76(2)

Where there was ample credible evidence to sustain a much more substantial award than the $6,500 granted defendants on their cross-complaint as fixed in verdict, trial court was without power to grant a new trial on ground of excessiveness of the damages.

16. Appeal and error 🔑867(1)

Where no ground was specified as basis of order granting plaintiff's motion for new trial, and it appeared that the notice of motion for a new trial specified errors of law, it was necessary to search the record and to demonstrate that no error of law was committed during trial which would justify the order granting the new trial. Code Civ.Proc. § 657.

17. Set-off and counterclaim ⚷29(2)

Where plaintiff's action was for price of meat alleged to have been delivered, defendants' cross-complaint charging plaintiff and a third party with a conspiracy to defraud on weight of meat delivered to defendants related to same transactions set forth in complaint as required by statute. Code Civ.Proc. § 442.

18. Parties ⚷53

A new party cannot be brought into a proceeding by defendant without an order of court.

19. Parties ⚷53

Trial court had jurisdiction to bring in a new party on defendants' motion by an ex parte order, and, if plaintiff desired, he should have maintained proceedings under statute to vacate the ex parte order. Code Civ.Proc. § 937.

20. Parties ⚷51(4)

Where defendants in action to recover price of meat delivered filed a cross-complaint charging plaintiff and a third party with conspiracy to defraud on weight of meat delivered, third person who allegedly conspired with plaintiff was properly brought into proceedings on defendants' motion as a "necessary party". Code Civ. Proc. § 389.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party".

21. Pleading ⚷319

Where cross-complaint was not based upon an account but was an action for damages for a conspiracy, no bill of particulars was necessary within meaning of statute. Code Civ.Proc. § 454.

◆

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by Louis T. Casaretto, individually and doing business under the firm name and style of Redwood Meat Co., against J. D. DeLucchi and another, copartners, doing business under the firm name and style of Mount Davidson Market, on a common count for goods allegedly sold by plaintiff to defendants, wherein the defendants filed a cross-complaint against the plaintiff and Richard Schroeter. The jury found in favor of the defendants on both the complaint and cross-complaint. From a judgment overruling plaintiff's motion for a new trial on the issues raised by the complaint, the plaintiff appeals, and from judgment granting motion of plaintiff and cross-complainant for new trial on issues raised by the cross-complaint, the defendants appeal.

Judgment on issues raised by complaint and answer affirmed, and order granting a new trial on issues raised by cross-complaint reversed.

Albert C. Picard and M. Anderson Thomas, both of San Francisco, for Louis T. Casaretto.

Stern & Grupp, of San Francisco, for J. D. DeLucchi and L. J. DeLucchi.

PETERS, Presiding Justice.

This action was brought by Louis T. Casaretto, doing business as the Redwood Meat Co., against J. D. and L. J. DeLucchi, partners, doing business as Mount Davidson Market, on a common count for goods allegedly sold by plaintiff to defendants. The goods sold consisted of meats which were allegedly sold and delivered during the period May, 1943, to November, 1943. According to plaintiff's evidence he delivered $14,013.66 of meat during the period in question to defendants for which he received only $5,854.90, leaving a claimed balance of $8,158.76. The defendants in their answer denied all the material allegations of the complaint, and, in addition, by way of set-off and counterclaim, alleged that plaintiff had overcharged them some $7,000 on the deliveries made. The defendants also cross-complained not only against plaintiff but also against one Schroeter, the former manager of the meat department of defendants. The first count of the cross-complaint alleged the existence of a conspiracy between Schroeter and plaintiff by means of which the conspirators planned to deteriorate the value of defendants' market so that it could be purchased by or sublet to them at much less than its real value; that pursuant to this conspiracy when Casaretto would deliver meat to defendants' market, Schroeter, as defendants' manager would receipt for meat in excess of the amount delivered. It is alleged that this phase of the conspiracy resulted in a loss in operation of $6,493.50 and a loss of profits in the sum of $5,058.22, or a total damage of $11,551.72.

The second count of the cross-complaint alleged that during this same period the defendants and cross-complainants were registered with the OPA as a retail meat market and had received from the OPA an allotment of red points; that Casaretto, during this period, was illegally operating as a meat wholesaler; that pursuant to the conspiracy between these parties not only was less meat delivered than was called for by the tags, but Casaretto collected red points for such meat never delivered with the result that defendants overdrew their red point ration bank account; that as a result, defendants' place of business was closed down by the OPA to the defendants' damage in the sum of $15,000. There is also a claim for exemplary damages in the amount of $25,000.

Demurrers to the answer and cross-complaint were overruled, whereupon the cross-defendants answered denying the allegations of the cross-complaint, and the cause proceeded to trial before a jury. The jury rendered two verdicts, one covering the issues raised by the complaint and answer, and the other covering the issues raised by the cross-complaint and the answer thereto. Both verdicts were in favor of the DeLucchis. On the complaint the jury found in favor of defendants. On the cross-complaint the jury also found in favor of the DeLucchis, and fixed the damages, assessed against both parties, at $6,500. Judgments were entered accordingly. Casaretto moved for a new trial in both proceedings, and Schroeter joined with him in moving for a new trial on the issues involved in the cross-complaint. The trial court denied the motion insofar as the judgment in favor of the DeLucchis based on the issues raised by the complaint was concerned. On the motion relating to the issues raised by the cross-complaint and answer the court denied the motion on condition the cross-complainants consent to a reduction from $6,500 to $500. The cross-complainants refused to accept the reduction, so that this motion for a new trial was granted.

Plaintiff Casaretto has appealed from the judgment in favor of the defendants rendered on the issues raised by the complaint, while the DeLucchis have appealed from the order granting the new trial on the issues raised by the cross-complaint.

Appeal by Casaretto

[1, 2] Most of the contentions raised by this appellant are highly technical and none are meritorious. No objection is made to any instruction given or refused by the trial court. A considerable number of technical objections are made to the pleadings. For example, the DeLucchis in their answer to the complaint set up a counter-claim. In this pleading it is averred that "Defendants incorporate Paragraphs I, II and III of cross-complainants' cross-complaint filed in this action and make the same a part of this Answer as though herein set forth at this point word for word." The cross-complaint was filed the same day as the answer. Casaretto urges that this is faulty pleading, and that his demurrer to the answer should have been sustained. It is urged that portions of a separate and distinct pleading cannot thus be incorporated by reference. Casaretto does not suggest how he was prejudiced by such a method of pleading. In fact, no prejudice could occur inasmuch as Casaretto had both the answer and the cross-complaint with its incorporated provisions before him. The function of pleadings is to inform the parties within reasonable limits of the nature of the action pending and the issues involved. It is not to create traps that will require a reversal for non-prejudicial errors. Incorporating by reference the allegations of a different cause of action of

the same pleading is a well-known method of pleading. Although such method of pleading has sometimes been mildly criticised (Green v. Clifford, 94 Cal. 49, 52, 29 P. 331) it has never been held to be reversible error. For the same reason, while incorporating the allegations of a separate and distinct pleading by reference may not be a commendable method to plead, it certainly cannot and should not be held to be reversible error where the opposing party has both pleadings before him.

A somewhat similar problem was involved in Turney v. Collins, 48 Cal.App.2d 381, 119 P.2d 954. In that case the pleader in an amended answer and counter-claim incorporated by reference certain exhibits pleaded in the original answer. In holding that this was not error the court stated (48 Cal.App.2d at page 388, 119 P.2d at page 958): "As the question here presented to us is open, we are of the opinion that there is not the slightest reason for holding that a pleading may not by reference incorporate an exhibit or allegation found in another pleading in the same case, even though the pleading has been superseded by such later pleading. Except in a case where a complaint has been filed and not served, or a new party is brought into the case after pleadings have been filed and served, the opposing parties have copies of the prior pleadings, and so have no need to be supplied again, either with allegations or exhibits set forth in earlier pleadings in the same case. Such a requirement would simply involve needless additional expense to a party, and moreover, it unduly encumbers the record."

There is no merit to this contention.

[3] It is next urged that the allegations of the counter-claim do not show that the counter-claim is based on the same transaction which is the foundation of plaintiff's complaint. Without any analysis by appellant Casaretto, it is extremely difficult to understand his contention on this point. The complaint is for the price of meat allegedly sold and delivered by plaintiff to defendants over a pleaded period of time. The counter-claim is for overcharges allegedly made on the same meat by plaintiff in his sales to defendants over the same period of time. Thus, even if a counter-claim had to relate to the "same transaction" set forth in the complaint this pleading amply complies with such requirement. (See cases collected 23 Cal.Jur. p. 237, § 15.) But the complete answer to this contention is that since the 1927 amendment to § 438 of the Code of Civil Procedure "the sole requisites of a counterclaim are that it 'must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action.' * * * Under the amendment it is not necessary that there be any connection between the cause of action set up in the complaint and that which forms the basis of the counterclaim." Terry Trading Corp. v. Barsky, 210 Cal. 428, 292 P. 474, 477. Luse v. Peters, 219 Cal. 625, 630, 28 P.2d 357; see, also, Bond v. Farmers & Merchants Nat. Bk., 64 Cal.App.2d 842, 149 P.2d 722; Robertson v. Maroevich, 42 Cal.App.2d 610, 109 P.2d 708. This contention is clearly without merit.

[4] The next contention is equally technical, and is equally without merit. It is contended that the answer pleads "fraud" as a defense, and based on this contention it is urged that fraud was not properly pleaded and that such a defense converted the action into an equity action in which the jury's verdicts were advisory only and in which plaintiff was entitled to findings of the court. The allegation complained of is found in Par. IV of the third defense set forth in the answer in which defendants allege that plaintiff delivered them meat but "overcharged" defendants some $7,000. It will be noted that no attempt to plead fraud is found in this allegation. An overcharge could be based on mistake as well as fraud. Moreover, no affirmative relief was awarded the DeLucchis on their counter-claim. It is not the counter-claim of the DeLucchis that charges fraud but their cross-complaint against both Casaretto and Schroeter. There can be no doubt at all that the cross-complaint alleges fraud in detail and with particularity. Casaretto strenuously

argues that fraud is equitable in nature, and that since this equitable cause of action was pleaded it was error to try such issues with the legal issues. He contends that he was entitled to findings of the trial court on all equitable issues. There are a whole series of contentions made not necessary to enumerate, all based on the assumption that since the cross-complaint charges fraud that cause of action was necessarily equitable in nature, and that it was error to submit these issues to a jury.

[5-7] These contentions are all based on the basic misconception that in all cases where fraud is pleaded the cause of action is necessarily exclusively within the jurisdiction of the equity court. Fraud is, of course, a peculiar object of equity jurisdiction, but where, as here, the only relief asked is for damages, where no equitable relief or remedies are invoked, and where the remedy for damages is not only adequate but speedy, the action is at law, and equity will refuse jurisdiction. Equity jurisdiction is not conferred by a mere charge of fraud made affirmatively or defensively. (See many cases collected and commented upon 10 Cal.Jur. p. 475, § 17; 10 Cal.Jur. p. 467, § 10; 19 Am.Jur. p. 65, § 42; 30 C.J.S., Equity, § 49, p. 383.) Here the cross-complaint asked only monetary relief. No equitable remedy or right was invoked. This being so, the entire cause was legal in nature and it was proper, therefore, to submit all issues to the jury.

[8] Casaretto also contends that certain evidence offered by the DeLucchis concerning their difficulties with the OPA was admitted erroneously and to his prejudice. In his brief the only example of such testimony referred to is a series of questions asked Casaretto as to whether he had any conversations with the DeLucchis in which he was advised that the DeLucchis had been called before the OPA because of a red point shortage. This evidence, and the other evidence relating to the red point shortage, was clearly within the issues raised by the cross-complaint. The questions, therefore, were not incompetent, irrelevant and immaterial, these being the objections made to them.

[9] It is next contended that the verdict on the issues raised by the complaint and answer and counter-claim is in conflict with the pleadings and the stipulation of the parties. Casaretto points out that he sued the defendants for $8,805.19 and that the DeLucchis in their counter-claim alleged that they were overcharged $7,000. It is therefore argued that on the basis of these pleadings the DeLucchis admitted a liability of $1,805.19 to Casaretto, and yet the jury awarded him nothing. This argument conveniently overlooks the allegations of the answer filed by the DeLucchis. The answer specifically denied that the DeLucchis owed plaintiff anything. The answer prayed "that plaintiff take nothing by reason of his complaint." The alleged overcharge of $7,000 was only to be considered an offset if the court found the DeLucchis owed Casaretto some sum of money. The verdict was clearly responsive to the issues.

[10] The contention that the DeLucchis stipulated during the trial that they had received all items of meat listed on the bill of particulars with the exception of an overcharge of $755.80 is without merit. A reading of the long record demonstrates that at all stages of the trial, both before and after the stipulation in question was entered into, the DeLucchis were strenuously contending that much of the meat listed in the bill of particulars had never been delivered. The stipulation in question was never treated during the trial as an admission by the DeLucchis that they had received the meat listed. All that the stipulation amounted to was to summarize the bill of particulars and to agree upon the poundage claimed by Casaretto. The exact words of the stipulation were that the "total poundage of beef we find from the bill of particulars delivered over the period of time or alleged to be delivered," etc. (R.T. 544.) And again, "Total pounds of meat delivered, according to the bill of particulars," etc. (R.T. 545.) Such a stipulation cannot be distorted into an admission that the DeLucchis

had no defense at all to the cause of action pleaded in the complaint.

It is also urged that the verdicts and judgment are contrary to the evidence. It is very difficult to understand this contention. The evidence most favorable to the DeLucchis on both the issues raised by the complaint and cross-complaint shows the following facts: Casaretto's place of business was Redwood City where he operated a retail meat market. He had no wholesaler's permit but his bill tags listed him as a wholesaler. The DeLucchis operated a large market in San Francisco, and in this market was a retail meat department. In November of 1942 Schroeter was hired by the DeLucchis as manager of their meat department. As such manager it was the duty of Schroeter to buy all meat for his department, to compute the red points for such purchases and to manage generally the department. When Schroeter was first hired the DeLucchis had been buying meat from various wholesalers. Shortly after Schroeter was hired meat became quite scarce and Schroeter experienced some difficulty in securing meat for his department. Schroeter was an old friend of Casaretto. Casaretto apparently secured quite a lot of meat, particularly beef. In April or early in May, 1943, Schroeter introduced Casaretto to the DeLucchis, and Casaretto agreed to furnish meat to the DeLucchis through Schroeter. The arrangement was a most peculiar one. Casaretto sold the beef to the DeLucchis at the same price he paid for it—the wholesale price. This was done in violation of governmental regulations, Casaretto not being a wholesaler. This fact, however, he never disclosed to the DeLucchis. Thus the beef, according to Casaretto, was sold without a profit, in fact, at a loss. This is so because Casaretto absorbed the cost and expense of delivery, shrinkage, bookkeeping costs, credit costs, etc. The reason offered at the trial to explain this somewhat unusual course of conduct was that Casaretto was able to get all the beef he wanted and he desired to keep up his allotments with the wholesalers. This explanation, however, was not given in any of the several OPA hearings held prior to trial. However, there was evidence that Casaretto was always short of meat and frequently sought more cattle. He did charge the DeLucchis more than the wholesale rate, but less than the retail rate, for meats other than beef. The DeLucchis, however, had no knowledge that they were being charged more than the wholesale rate for lamb and other nonbeef meats. The largest amount of meat delivered, however, according to the bill of particulars, was beef.

Between the period May to November, 1943, Casaretto delivered large quantities of meat to the DeLucchis under this arrangement. Schroeter, being the purchasing agent for the DeLucchis, gradually saw to it that practically all the meat for the DeLucchis' market was purchased through Casaretto and the allotments with the various wholesalers were allowed to lapse.

When Casaretto delivered meat to the DeLucchis' market he would always deliver the same to Schroeter who would weigh the meat and sign a tag for it. Casaretto would give the original tag to Schroeter and keep a copy for himself. Casaretto or Schroeter figured out the red points required, and Schroeter drew an order for the amount of points involved.

The theory of the DeLucchis was that Schroeter would sign for a greater poundage of meat than was actually delivered. This had several results. It made the operation of the meat market unprofitable, so that, according to the DeLucchis, Casaretto and Schroeter could purchase the market from the DeLucchis for less than its true value. There is evidence that Casaretto tried to sublet the meat market at a very low monthly rental. Such practices also resulted in Casaretto receiving more red points than he was entitled to, thus depleting the DeLucchi stock of red points. Direct evidence was offered by the DeLucchis that as to at least two deliveries improper practices were indulged in by Casaretto. Thus evidence was offered relating to a delivery supposedly made on August 9, 1943. This load, contrary to the usual custom, was not delivered by

Casaretto but was picked up in Redwood City by an employee of the DeLucchis, Scheppleman by name. Scheppleman testified that he signed for the meat in Redwood City and brought a signed copy of the receipt tag back with him to San Francisco; that this tag was made out for either 3,255 or 3,235 pounds of meat; that he arrived back at the DeLucchis' market at about 6:00 p. m.; that Schroeter had left and that he and the DeLucchis weighed the meat and found a shortage; that the actual weight was 3,001 pounds. Both Scheppleman and Joe DeLucchi testified that a note was left for Schroeter to check this delivery and they left the duplicate tag with the note; that this was the last they ever saw of the Scheppleman tag. Casaretto offered in evidence a tag for this delivery which is signed by Schroeter and which states that 5,600 pounds of meat were delivered on that date. Strangely enough, this Schroeter tag is dated August 8th, which was a Sunday. As to this delivery, if the testimony offered by the DeLucchis was believed, as apparently it was, there was an overcharge of some 2,600 pounds. During the months here involved this was apparently the only delivery checked by the DeLucchis as to the weight claimed delivered, as this was otherwise left entirely in Schroeter's hands.

There was also some peculiar circumstances surrounding an alleged delivery of meat on November 2, 1943. The tag offered by Casaretto to support this delivery was a duplicate tag signed by Joe DeLucchi, who signed it at the request of Casaretto who claimed that the original tag signed by Schroeter had been lost. At first Joe DeLucchi refused to sign this tag because he did not know whether he had received the meat, but Casaretto presented him with a bill of sale of the San Mateo Meat Company, wholesalers, showing that Casaretto had purchased the alleged meat from them that day. Upon this showing Joe DeLucchi signed the tag. At the trial the evidence offered by the DeLucchis demonstrated that Casaretto had not bought the meat in question from the San Mateo Meat Company until November 3, 1943, and that the tag had been altered not only as to the date but as to the price paid by Casaretto for this meat. The DeLucchis had been suspended by the OPA on the morning of November 2, 1943, and prohibited from buying any more red point items. The DeLucchis claim, therefore, that they could not possibly have purchased this meat on the third, and that this whole alleged sale, totalling 1,742 pounds of beef and 258 pounds of lamb was a fraud. Casaretto and Schroeter testified that the meat was actually delivered on the third, and that the date was changed to the second at Joe DeLucchi's request to make it appear that the meat had been purchased before the OPA suspension became effective. This was denied by Joe DeLucchi. This conflict in the direct and inferential evidence was resolved against Casaretto by the jury.

The DeLucchis offered some corroborative evidence that demonstrates that something was very wrong with the meat department from May to November, 1943. They showed that from January 1, 1943, to May 28, 1943, the meat market made a net profit of $2,340.62. This was before the dealings with Casaretto began. From May 29, 1943, to November 28, 1943, the meat market lost $6,597.39, although the amount of sales increased during this latter period. The records show that if Casaretto's figures are correct, $90.68 more was actually charged during this period for meat than was taken in on sales. There was evidence that meat bought at wholesale ceiling and sold at retail ceiling would net the retailer between 30 to 33⅓% profit.

There were also some other facts testified to from which the jury could and apparently did indulge in inferences unfavorable to Casaretto. It was shown that, although Casaretto and Schroeter had known each other for fifteen years, it was not until after May of 1943 that they became intimate friends. Schroeter spent much time visiting at Casaretto's house and lived there on several occasions. At the time of trial Schroeter was working for Casaretto. Casaretto loaned Schroeter $300 to make a down payment on a house Schroeter was buying. This supposed loan was not evidenced by any records, and no entry was made in the books of the

Redwood Meat Company, although the check was drawn on the account of that company. This "loan" was repaid in February, 1944, without interest, after the DeLucchis had discovered their red point shortage and while the DeLucchis were investigating the matter. Detailed and careful records were made out by the parties as to the repayment.

The books of Casaretto were in a somewhat questionable condition. At the trial a ledger sheet of the DeLucchi account was introduced. The entries thereon were not always in rotation by dates. Thus there would be an entry like May 6th following an entry of June 3rd. Casaretto tried to explain this anomalous situation but the sufficiency of his explanation was for the jury. Moreover, both Joe DeLucchi and his bookkeeper testified that while investigating the red point shortage they checked Casaretto's accounts and were told that no ledger sheet of their account was kept.

The evidence also shows that on November 2, 1943, the OPA forbade the DeLucchis from purchasing any more red point items because of a huge red point shortage of about 88,000 points. Subsequently, the meat market was suspended for a year. Obviously, if Casaretto overcharged the DeLucchis as to poundage and received red points based on the overcharges, it would deplete the DeLucchi supply of red points.

[11] It is quite clear that the above evidence, plus the reasonable inferences therefrom, sustains the finding of the jury that Casaretto did not sustain the burden of proof of showing what meat had in fact been delivered. The judgment based on the verdict is amply supported and should be affirmed.

Appeal by the DeLucchis from the order granting a new trial to Casaretto and Schroeter on the judgment for $6,500 based on the issues raised by the cross-complaint.

Casaretto and Schroeter contend that the order is not appealable because, so they claim, the action was equitable in nature, and jury trial was therefore not a matter of right. The 1945 amendment to § 963 of the Code of Civil Procedure permitting appeals from orders granting a new trial in equitable actions was not effective when this order was made. The answer to this contention has already been given in discussing the appeal by Casaretto. The action was legal in nature, the relief asked was legal, the legal remedy was adequate, and the parties were entitled to a jury trial as a matter of right.

[12-14] The motion for a new trial on the judgment based on the issues raised by the cross-complaint was made on the ground of excessive damages, insufficiency of evidence and errors in law occurring at the trial. The trial court, it will be remembered, granted this motion for a new trial unless the DeLucchis agreed to a reduction in damages from $6,500 to $500. The trial judge did not specify insufficiency of the evidence as a basis of his order, so that that ground must be disregarded. (§ 657, Code Civ.Proc.) No ground at all was specified as the basis of the order. It is obvious, however, that the basis of the order granting the new trial must have been excessive damages in view of the provision of the order that if the DeLucchis would accept a reduction to $500 the motion would be denied. However, the trial court's power in this respect is much more limited than it is when the order is based on insufficiency. Section 657, sub. 5, of the Code of Civil Procedure, provides that a new trial may be granted on the ground of "excessive damages, appearing to have been given under the influence of passion or prejudice." A new trial may not be granted on this ground merely because the verdict seems large, but only when it appears to have been given under the influence of passion or prejudice. The trial court may interfere with the verdict on this ground only where the verdict is so disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice. Thus if the evidence before the trial court is conflicting, and there is substantial evidence to sustain the award, no right to grant a new trial on the ground of excessiveness of the verdict exists where insufficiency of the evidence is not also specified as a ground of the order. These principles are all well

settled. (See cases collected 20 Cal.Jur. p. 99, et seq., § 64, et seq.)

[15] Tested by these standards the evidence produced by the DeLucchis amply supports the award of $6,500. As already pointed out, the evidence shows that the DeLucchis should have made a gross profit of between 30 to 33⅓% on all meat sold. From May to November the net loss of the meat market was $6,597.39. They should have made a net profit of nearly $2,000. Thus, as to this item of damage alone they were damaged in excess of $8,400. Casaretto and Schroeter attack these computations by pointing out that the DeLucchi records made it extremely difficult to know whether charges were made against the meat or grocery departments. However, the bookkeeper of the DeLucchis explained the books in detail.

In addition, as a result of the loss of red points the DeLucchis were first forbidden by OPA to purchase red point items, and then their meat department was completely suspended for a year. Thus, they were deprived of prospective profits in excess of the amount of the award.

Casaretto and Schroeter strenuously argue that they cannot be held responsible for the red point shortage because red point items were sold by the grocery department of DeLucchis' as well as the meat department, and but one red point bank account was maintained for both departments. The son of Schroeter who worked for the DeLucchis in the grocery department testified that he delivered many red point items to customers on DeLucchis' orders without securing red points. He named the customers he claimed who had been so favored. Practically every customer named was called as a witness and categorically denied the statements of young Schroeter. The other evidence on this point has already been reviewed. Obviously, if Casaretto overcharged on poundage he depleted the red point bank. The jury was entitled to infer that the deficiency in red points was caused by Casaretto and Schroeter.

It is obvious, therefore, that there is ample, substantial and credible evidence in the record to sustain a much more substantial award than the $6,500 fixed in the verdict. It is equally clear that under such circumstances the trial court was without power to grant a new trial on the ground of excessiveness of the damages.

[16] It will be noted that the notice of motion for a new trial also specified errors of law. Under the rule announced in Scott v. Renz, 67 Cal.App.2d 428, 154 P.2d 738, it is necessary to search the record and to demonstrate that no error of law was committed during the trial which would justify the order granting the new trial. The entire record has been read. Considering the length of the trial but few objections to evidence were made. All rulings by the trial court on admissibility of the evidence were correct. No claim is or can be made that any instruction given to the jury was erroneous.

[17] The respondents Casaretto and Schroeter claim that the cross-complaint does not state a cause of action, and that their demurrer and supplementary demurrer thereto should have been sustained. It is urged that the allegations of the cross-complaint fail to show that the relief sought relates or depends upon the transaction upon which the main action was brought as required by § 442 of the Code of Civil Procedure. The point lacks merit. The Casaretto action was for the price of meat alleged to have been delivered. The cross-complaint charges Casaretto and Schroeter with a conspiracy to defraud on the weight of the beef delivered. Obviously, the cross-complaint relates to the same transaction set forth in the complaint.

[18, 19] It is also contended that Schroeter was never properly made a party to the action. Schroeter was brought into the proceeding by the cross-complaint. The order making him a party was secured by DeLucchis' counsel ex parte without notice to Casaretto. It is urged that this rendered invalid the proceedings based on the cross-complaint. It is of course the law that a new party cannot be brought into the proceedings by a defendant without an order of court. Alpers v. Bliss, 145 Cal. 565, 79 P. 171. That same case

decided that if such an order is secured ex parte it may be vacated upon proceedings had under § 937 of the Code of Civil Procedure. The law is well settled that § 937 is applicable only to such orders as a court or judge has power or jurisdiction to make without notice. (See cases collected 18 Cal.Jur. p. 672, § 23.) Thus the holding of the Alpers case is necessarily predicated upon the assumption that the court has jurisdction to bring in a new party by an ex parte order. No proceedings under § 937 of the Code of Civil Procedure were here instituted.

[20] The contention that Schroeter was not a party whose presence was necessary to a complete determination of the controversy as required by § 389 of the Code of Civil Procedure is so clearly without merit that the mere statement of the proposition carries its own refutation. The evidence already cited determines how necessary Schroeter's presence was to settle the controversy raised by the cross-complaint. (See cases collected 21 Cal. Jur. p. 82, § 52.)

[21] Casaretto and Schroeter also claim error in the action of the trial court in granting the DeLucchis' motion to strike their demand for a bill of particulars. The cross-complaint was not based upon an account, but was an action for damages for a conspiracy. No claim based on contract was invoked and no specific demands were made against Casaretto and Schroeter. Under such circumstances no bill of particulars was necessary within the meaning of § 454 of the Code of Civil Procedure. (See cases collected 1 Cal.Jur. p. 157, § 18.)

There was no possible error of law that has been suggested by Casaretto or Schroeter or that we have found that supports the order granting the new trial.

The judgment in favor of the DeLucchis based on the issues raised by the complaint and answer is affirmed; the order granting a new trial on the issues raised by the cross-complaint is reversed.

WARD, J., and SCHOTTKY, J. pro tem., concur.

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77 Cal.App.2d 17

GUILD v. STOCKTON ICE RINK CO. et al.

No. 13135.

District Court of Appeal, First District, Division 1, California.

Nov. 25, 1946.

1. Contracts ⚷234

An ice rink construction contractor, failing to provide equipment required by contract, was not entitled to recover half of difference between contract estimate of construction cost and lower actual cost under contract provision for equal division of saving if job cost ran under estimated cost.

2. Appeal and error ⚷1011(1)

The trial court is judge of weight of conflicting testimony, and appellate court may not interfere with trial court's fact finding supported by substantial evidence.

3. Work and labor ⚷28(5)

In action for amount due plaintiff for services as consulting engineer in addition to sum due him under contract to construct ice rink for defendant, evidence justified conclusion that such services were required to be performed in carrying out plaintiff's agreement to procure and install equipment called for in such contract, so as to preclude recovery for such services, regardless of whether recovery for part of them was barred by limitations. Code Civ.Proc. § 339, subd. 1.

4. Appeal and error ⚷1071(3)

Where judgment is amply supported by unobjectionable fact findings of trial court, its findings on other issues are immaterial, and fact that such other findings are unsupported by evidence or are otherwise defective is not ground for reversal of judgment.

◆

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by H. C. Guild against the Stockton Ice Rink Company and others to recover sums due on a contract for construction of an ice rink and for services as a consulting engineer, in which defendants filed a cross-complaint for the amount of an alleged overpayment and damages for plaintiff's nonperformance of the contract. From a judgment for defendants on the complaint, plaintiff appeals.

Affirmed.

Mueller & Westover, of San Francisco, for appellant.

William A. White, of San Francisco, for respondents.

SCHOTTKY, Justice pro tem.

Appellant commenced an action against respondents, the first cause of action of which sought to recover the sum of $2,367.97 alleged to be due upon a contract concerning the erection of an ice rink in Stockton, and the third cause of action of which sought to recover the sum of $1,215 for services as a consulting engineer rendered to respondents by appellant at respondents' special instance and request. A second cause of action upon a book account was abandoned at the trial. Respondents in their answer set up nonperformance by appellant and denied that any sums were due appellant. Respondents also filed a cross-complaint in which they alleged an overpayment of $473.59 to appellant and also alleged that nonperformance of the contract by appellant damaged them in the sum of $11,000. During the course of the trial respondents were permitted to file an amendment to their answer setting up the defense that said third cause of action was barred by subdivision 1 of section 339 of the Code of Civil Procedure. The court found that appellant was not entitled to recover on either cause of action, and further that respondents were not entitled to recover upon their cross-complaint, the court finding also that there was an overpayment of $473.59 by respondents, but that any claim thereon had been waived by them. This appeal is from the judgment rendered against appellant upon his complaint.

Plaintiff is a "consulting engineer for the construction of ice rinks." On August 1, 1941, an agent of defendants, Tom Boothe, accepted plaintiff's proposal to construct a direct expansion ice rink for defendants. This proposal was in the form of a letter and the specifications therein were itemized with reference to another proposal which defendants had received concerning the erection of a brine ice rink. The pertinent portions of the proposal which the court found to be the agreement of the parties read:

"This equipment is designed for producing an ice skating surface 70' x 140' in the City of Stockton, California. All dimensions are subject to minor variations and changes in order to fit the apparatus to the contemplated building measurements, or secure maximum results. * * *

"In this specification requisite performance has been considered first, availability of material second. First cost is simply the totaling of the best procurable price at this time.

"Item 1. Ammonia Compressors

"Two—8" x 8", standard make—Worthington, Baker-Frick, York or equal, complete with all standard equipment, including Y-belt drives. * * *

"Item 3: Condenser (Tubular condenser cheaper but not best).

"1,000 Lin. feet of condensing surface made up into vertical atmospheric evaporative condenser, complete with natural air circulation and gravity water circulation. * * *

"Item 19: Motors and Drive

"This proposal includes the furnishing of two 125 HP Butane engines, complete with Governors, Tachometers, power take-offs, V-belts, fuel tank and all accessories. * * *

"Item 24: Erection

"Complete erection is here included. * * *

"The price of the above equipment is $22,814.00 which carries ten per cent to me. * * *

"My proposition would be ten per cent as stated. If the job cost ran over the estimated cost it would come out of my fee. If it ran under we would split the saving 50–50.

"This of course would not hold good in event of a raise in prices as my figures are based on prices quoted today."

The three specific items of material above noted are the principal items with respect to which nonperformance is alleged. It is admitted even by plaintiff that the above specifications and price were based on new materials, and that only one used compressor was present in the finished ice rink. It is also admitted that only 750 square feet of condensing surface was installed. (With an installation using only one compressor, this condensing surface would appear to be all that could be used.) Finally it is admitted that one of the engines was 110 h. p. and there is evidence that the other engine was only 110 h. p. However, the rink was opened to the public in November of 1941 and has been operating ever since with various difficulties in freezing and holding the ice in parts of the rink. The evidence in defendants' favor supports the conclusion that at no time did defendants consent to the lack of a second compressor and made constant efforts to secure another one.

The record shows that the rink as constructed cost $4,735.93 less than the $22,814 contract price and the first cause of action in plaintiff's complaint sought to recover 50% of that amount pursuant to the terms of the contract. The cost of two new compressors installed is approximately $6,130; the cost of the additional condensing surface approximately $250; and the cost of the additional horsepower motors, approximately $600. The used compressor cost approximately $1,890. Defendants paid plaintiff $2,281.40 of which the court found that $473.59 was an overpayment, any claim for which was waived by the defendants, this amount being 10% of the difference between actual cost and contract price and in accord with plaintiff's testimony as to what he meant by the 10%.

Appellant makes a vigorous attack upon the judgment against him as to the first cause as being contrary to and unsupported by the evidence. He argues that the agreement was a contract for his services as a consulting engineer and that it was not a contract for equipment. He argues further that in any event any variations in the equipment were but minor variations and that the contract was substantially performed. He asserts that because the court made a finding that appellant did not have a state license either as a contractor or a civil engineer, the court considered appellant as a building contractor or a civil engineer and that the court's decision was based upon that issue.

[1] These contentions of appellant lack substantial merit. The record amply supports the finding of the trial court that by reason of the failure of appellant to provide the equipment called for by the agreement he was not entitled to recover one-half of the difference between the cost of the rink and the contract estimate of $22,814. To hold otherwise would be to permit appellant to omit part of the equipment specified, substitute used equipment where new was specified, produce a rink less efficient than it would have been had the specified equipment been provided, and then actually profit by the lower price brought about by his failure to perform according to the plain terms of the contract.

As to appellant's contention that the license issue was erroneously injected into the case, there is the court's finding of the undisputed fact that appellant did not have either a contractor's license or a civil engineer's license, but there is no finding that, in carrying out his agreement in the instant case, appellant was acting either as a contractor or a civil engineer. In view of the fact that the court was no doubt convinced that the appellant has failed to perform the contract and was, therefore, not entitled to recover upon his first cause of action, a finding as to whether he was acting as a contractor or a civil engineer was of no importance, as, under the evidence and the finding of the court, he was not entitled to recover judgment even if he were a duly licensed contractor or civil engineer. It is, therefore, unnecessary to decide whether appellant was acting as a contractor or a civil engineer.

Appellant next attacks the judgment against him as to the third cause of action. This cause of action was in the form of a common count as follows: "That within four years last past at the City and County of San Francisco, State of California, said defendants became indebted to said plaintiff in the sum of Twelve Hundred Fifteen and no/100 ($1215.00) Dollars for professional services rendered said defendants at said defendants' special instance and request as a consulting engineer." Respondents denied said allegation and at the trial, when it appeared that appellant was not relying upon a written agreement, respondents were permitted by the court to file an amendment setting up the defense that this cause of action was barred by subdivision 1 of section 339 of the Code of Civil Procedure.

At the trial appellant produced an itemized list of services which he testified were performed for respondents in addition to the services called for by the contract involved in the first cause of action. These services for the most part were in connection with trying to get the additional compressor called for in the aforesaid contract or in getting the equipment that had been installed to function better. The record shows that respondents on a number of occasions were urging appellant to get the extra compressor and were also urging appellant to remedy what they considered to be faulty operation of the equipment installed under appellant's direction. After the amendment setting up the two year statute of limitations, appellant virtually abandoned seeking to recover for the items occurring prior to two years before the filing of the complaint, thereby reducing his asserted claim from $1,215 to $531, and appellant does not now claim that he should have recovered judgment for more than $531 upon said third cause of action.

The court found that the allegations of said paragraph III of the third cause of action were untrue and also that the third cause of action was barred by subdivision 1 of section 339 of the Code of Civil Procedure.

Appellant argues that no witness testified that the services covered by the third cause of action were not performed, nor that the reasonable value thereof was not $1,215, as testified to by appellant, and attacks the finding of the court that appellant's allegation that respondents became indebted to him is untrue. Appellant asserts that the court should have found that the said allegations are true but that the items prior to March 7, 1942, are barred by the statute.

[2-4] However, the trial court was the judge of the weight of the conflicting testimony, and we may not interfere with its finding if it is supported by substantial evidence. Upon the record here, we believe that the trial court was fully justified in concluding that the services which appellant claimed were extra and additional services were in fact services which he was required to perform in carrying out his agreement to procure and have installed in respondents' rink the equipment called for in the agreement. The fact that respondents kept after appellant to get the rest of the equipment and did not consider that appellant had completed his contract, and the further fact that appellant had never sent respondents a bill or made any demand for these so-called extra services prior to the filing of the action, all lend support to the conclusion reached by the trial court. The finding that said cause of action is barred by the statute of limitations is perhaps too broad insofar as it relates to the items within the two year period, but, in view of the prior finding that the respondents did not become indebted to appellant as alleged in said third cause of action, the finding as to the statute of limitations may be disregarded. For, as stated in 2 Cal.Jur., pp. 1028, 1029, § 612: "But if a judgment is amply supported by findings which are unobjectionable, findings on other issues become immaterial, and it is not ground for reversal that such other findings are unsupported by evidence, or are uncertain or otherwise defective. However unsupported or inconclusive any number of findings may be, if in any case there be at least one clear, sustained and sufficient finding upon which the judgment may rest, every presumption being in favor of the judgment, it will be concluded on appeal that the court rested its judgment upon that finding (or such findings) and the others will be disregarded." (Citing numerous cases.)

No other points raised by appellant require discussion. A reading of the record convinces us that not only is the judgment amply supported by the evidence, but it is difficult to understand how the court could reasonably have arrived at any other conclusion.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

77 Cal.App.2d 23

PEOPLE v. KELLY.

Civ. 13151.

District Court of Appeal, First District, Division 2, California.

Nov. 25, 1946.

1. Trial ⇨105(5)

An uncertified document signed only with a rubber stamp bearing the name of the registrar of vital statistics, addressed to the State Department of Public Health, and stating that mother of child and man sought to be compelled to support the child were married on certain date, though not the best evidence, was sufficient to establish that records of department showed that the parties were married on date shown, where the document was admitted without objection.

2. Bastards ⇨6

On appeal by husband from judgment requiring him to pay monthly sum for support of child which was ward of juvenile court, husband could not successfully contend that the child referred to in the birth certificate was not his wife's child, though one other than the husband was named in the certificate as the father of the child, and wife's maiden name was misspelled in certificate, where certificate was produced by husband's counsel and was introduced with his consent.

3. Bastards ⇨6

In proceeding to compel husband to pay monthly sum for support of a child which was a ward of the juvenile court, and which was allegedly the child of his wife, testimony of investigator for juvenile court that husband had stated to her that he did not believe that he was the father of the child, though he could not prove the contrary, was sufficient to establish the identity of wife as mother of the child in question, though wife's name was not correctly given in birth certificate that was introduced in evidence.

4. Bastards ⇨3

In proceeding to compel husband to pay for support of a child who was a ward of the juvenile court and who was allegedly a child of him and his wife, husband's admission that he did not believe that he was the father of the child, but that he could not prove the contrary, was sufficient to prove that husband had conjugal access to his wife within period of child's conception, so that his paternity was conclusively presumed. Code Civ.Proc. § 1962, subd. 5.

5. Bastards ⇨3

The fact that name of third person appeared on birth certificate as father of child was only prima facie evidence of that fact, and was open to contradiction in proceeding in juvenile court to compel husband of mother of child to pay for support of child, and was required to fall before the conclusive presumption that the child was that of the husband, because husband had conjugal access to child's mother within period of child's conception. Code Civ.Proc. § 1962, subd. 5.

6. Evidence ⇨75

Where husband, in proceeding against him in juvenile court to compel him to pay for support of his wife's child, chose to produce no evidence in his own behalf that he was not the father, though it was in his power to contradict evidence produced against him, husband's failure was sufficient to support an inference that such evidence, if produced, would have been unfavorable to him.

* * *

Appeal from Superior Court, City and County of San Francisco; Theresa Meikle, Judge.

Proceeding by the State of California against William Kelly. From a judgment of the juvenile court ordering William Kelly, as father of Richard Lee Kelly, to pay a certain monthly sum for the support and maintenance of Richard Lee Kelly, William Kelly appeals.

Judgment affirmed.

Walter H. Duane, of San Francisco, for appellant.

John J. O'Toole, City Atty., Bernard J. Ward, Jr., Deputy City Atty., both of San Francisco, for respondent.

DOOLING, Justice.

This is an appeal from a judgment of the Juvenile Court ordering appellant, as father of Richard Lee Kelly, who had previously been adjudged a ward of said Juvenile Court, to pay the sum of $42.50 per month for the support and maintenance of said child. The sole ground urged upon appeal is the insufficiency of the evidence to establish the relationship of father and child between appellant and the ward of the court.

On the hearing an uncertified document signed only with a rubber stamp "Wilton L. Halverson, M.D., Registrar of Vital Statistics," was introduced in evidence, not only without objection from counsel for appellant, but actually at his insistence. This document is addressed to "State Department of Public Health, Division of Vital Statistics" and is a request to verify certain records including the following:

"Marriage	Place	Date
William Kelly and Theresa Wenstrom	S.F.	11–23–35."

No correction was made in these particular words and figures, and above Dr. Halverson's name so stamped on the document are the words:

"The above has been found correct with exceptions as noted."

[1] While not the best evidence this document, admitted as it was, not only without objection but actually at appellant's request, is sufficient to establish that the records of the department show that William Kelly and Theresa Wenstrom were married on November 23, 1935. Incompetent evidence introduced by consent or without objection is sufficient to support a finding. Nelson v. Fernando Nelson & Sons, 5 Cal. 2d 511, 518, 55 P.2d 859; Blume v. MacGregor, 64 Cal.App.2d 244, 252, 148 P.2d 656; Weiss v. Bank of America, 57 Cal. App.2d 892, 895, 135 P.2d 584.

A certified copy of a birth certificate was produced by counsel for appellant under the following circumstances. At the close of the hearing the record shows the following colloquy between the court and counsel for the appellant:

"The Court: The case will be continued for two weeks to secure a certified birth certificate from the State Department of Vital Statistics.

"Mr. Duane: If you wish time saved, and you are willing to accept it, I will give you one right now.

"The Court: Very well. Let us have it. May we introduce this in the record as the certified copy of the birth certificate?

"Mr. Duane: Yes.

"The Court: It is hereby admitted in evidence as Petitioner's Exhibit No. 2."

The certified copy of the birth certificate shows that a child, Richard Lee Holtz, was born in Alhambra, California, on December 14, 1937. The father's name is given as Louis John Holtz and the mother's maiden name as Theresa Viola Wenstron.

[2] Appellant argues that the names Wenstro*m* and Wenstro*n* are not the same and that the presumption of identity of person from identity of name (Code Civ.Proc. sec. 1963, subd. 25) cannot therefore be indulged. We do not find it necessary to decide this question for the following reasons. Produced, as the birth certificate was, by counsel for appellant and introduced with his consent, counsel cannot now claim that the Richard Lee Holtz referred to in the birth certificate is not the Richard Lee Kelly whose paternity was in issue before the Juvenile Court. That being so the difference between the spellings of the maiden name of Theresa Wenstro*m* shown to have been married to William Kelly and the Theresa Viola Wenstro*n* shown to be the

mother of the child before the court is explained away by the following testimony of the witness Mrs. Cooley, an investigator for the Juvenile Court:

"Mr. Kelly has stated that his wife has always drank since their marriage and has been promiscuous in her relations with other men, and was promiscuous at the time he was living with her. He states that he does not believe he is the father of Richard, although he indicated to me that he could not prove to me the contrary."

[3] The admissions of appellant, so testified to, close the gap and establish the identity of appellant's wife as the mother of the child here in question.

[4, 5] The admission of appellant that he believed that he was not Richard's father although he could not prove that fact supports the inference that he had conjugal access to his wife within the period of the child's conception in which event his paternity would be conclusively presumed. Code Civ.Proc. sec. 1962, subd. 5. The fact that Louis John Holtz appears on the birth certificate as father is only prima facie evidence of the fact (Health and Safety Code, sec. 10551), was open to contradiction (Estate of Woodson, 36 Cal.App.2d 77, 96 P.2d 1016) and must fall before the conclusive presumption above referred to.

[6] Some hearsay evidence was admitted over appellant's objection, but the essential facts are established without resort to such testimony. The appellant chose to produce no evidence in his own behalf, although it was in his power to contradict the evidence produced against him if the truth lay on his side. This failure is sufficient to support an inference that such evidence if produced would have been unfavorable. Leenders v. Cal. Hawaiian, etc., Corp., 59 Cal.App.2d 752, 758, 139 P.2d 987.

The judgment appealed from is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

29 Cal.2d 228

PACIFIC VEGETABLE OIL CORPORATION v. C. S. T., Limited.

S. F. 17321.

Supreme Court of California, in Bank.

Nov. 12, 1946.

1. Arbitration and award ⇨52

Arbitrators need not find facts and give reasons for their awards.

2. Contracts ⇨292½

Where contracting parties were subject to rules of association requiring arbitration of disputes, a duly adopted amendment of a rule relating to a matter of procedure after the date of the contract or during the pendency of arbitration proceedings was applicable so long as the parties' substantial rights were not affected.

3. Contracts ⇨292½

Substantial rights of parties were not affected by a change in association rule governing the form and extent of decision on an award.

4. Contracts ⇨292½

Where contracting parties agreed to be bound by the published rules of an association but there was no express incorporation into the contract of specified rules, a duly adopted amendment relating merely to the form and extent of the decision on an award would be applicable to pending proceeding.

5. Contracts ⇨292½

Where contracting parties were subject to rules of association requiring arbitration of disputes arising under contract, and an award was made, the merits of the controversy between parties were not subject to judicial review. Code Civ.Proc. § 1288(a–d).

6. Contracts ⇨303(1)

"Force majeure" or "vis major" is not necessarily limited to the equivalent of an act of God, but the test is whether under the particular circumstances there is such an insuperable interference occurring without the party's intervention as could not have been prevented by prudence, diligence and care.

See Words and Phrases, Permanent Edition, for all other definitions of "Force Majeure" and "Vis Major".

7. Contracts ⇨292½

Where seller was not responsible for nonshipment directly resulting from contingency beyond its control, in which event contract was automatically terminated if shipment was not made within two months after contract time, and arbitrators found that there was termination of contract because of force majeure, court properly refused to set aside award where it could have concluded that the board of arbitrators ascribed nonshipment to war, either directly causing delay in vessel's movements, or indirectly by intervention of governmental action provoked by the necessities of war. Code Civ.Proc. § 1288(a–d).

8. Contracts ⇨292½

Where contracting parties were subject to rules of association which provided for arbitration of disputes arising under contract, and association rule provided for written statements of fact, together with written arguments thereon, written statements of fact were proper evidence.

9. Contracts ⇨292½

Where buyer and seller were subject to rules of association providing for arbitration of disputes and seller was not responsible for nonshipment directly resulting from contingency beyond its control, in which event contract was automatically terminated if shipment was not made within two months after contract time, what would constitute proof of a contingency beyond the seller's control was a question for the arbitrators to determine. Code Civ.Proc. § 1288(a–d).

10. Arbitration and award ⇨73

The form and sufficiency of the evidence and the credibility and good faith of the parties in the absence of corruption, fraud or undue means in obtaining an award, are not matters for judicial review. Code Civ.Proc. § 1288(a–d).

11. Contracts ⇨292½

Where in arbitration proceedings the seller made specific mention of the impossibility of performance because vessel was delayed on account of repairs and war conditions, and buyer had opportunity to refute seller's claim of delay due to repairs and war conditions but omitted any reply thereto until its contentions in respect thereof were included in the statement on appeal to association board of appeals, buyer's contention that seller's opening statement did not contain evidence or present its case in chief on both grounds of impossibility of performance would be overruled. Code Civ.Proc. § 1288(a–d).

12. Contracts ⚷292½

In arbitration proceedings where seller in its opening statement made specific mention of impossibility of performance because vessel was delayed by repairs and war conditions, that documentary evidence in support of governmental interference was not submitted until the seller's reply statement was filed, did not require that award be set aside. Code Civ.Proc. § 1288 (a–d).

13. Contracts ⚷292½

Where arbitrators found that contract was terminated because of force majeure and one seeking to set aside award conceded that "force majeure" could refer to governmental action, contention that employment of the phrase did not indicate whether arbitrators placed their decision upon conditions of war causing delay or upon interference by government was not ground for setting aside award where arbitrators heard all the evidence offered by the parties. Code Civ.Proc. § 1288(a–d).

14. Arbitration and award ⚷76

In order that claimed departure from usual procedure be held to amount to misconduct of the arbitrators sufficient to vacate an award, it must be shown that such departure prejudiced the rights of the parties seeking to vacate the award. Code Civ.Proc. § 1288(c).

15. Arbitration and award ⚷1

The purpose of the law in recognizing arbitration agreements and in providing statutory means of enforcement is to encourage persons to avoid delay by obtaining adjustment of their differences by an agency of their own choosing.

16. Contracts ⚷292½

In the absence of any evidence that would disprove seller's defense which arbitrators found good, there was no showing of prejudice which would justify vacation of award on account of alleged departure from usual procedure, and fact that buyer was not given further opportunity to comment on and point out any claimed discrepancies in cumulative evidence included in seller's reply statement was insufficient to show prejudice. Code Civ.Proc. § 1288 (c).

17. Arbitration and award ⚷73

Presumption is that arbitrators were experienced men capable of weighing the evidence and giving due consideration to opposing inferences.

18. Arbitration and award ⚷31, 34

Arbitrators are not bound by strict adherence to legal procedure and to the rules on admission of evidence expected in judicial trials.

19. Contracts ⚷292½

Where contracting parties were subject to rules of association which required arbitration of controversies arising under contract and for a board of appeal, the board of appeal had power to examine and consider the entire evidence and any proffered additional evidence for the purpose of determining any claimed misbehavior by arbitrators prejudicial to rights of complaining party.

20. Contracts ⚷292½

Evidence showed that arbitrators reached a mutual, definite, and final award without hindrance in any respect. Code Civ.Proc. § 1288(c).

21. Contracts ⚷292½

In proceeding to set aside award, evidence showed that buyer was not denied right to present its case and no refusal to hear evidence but that there was a substantial compliance with the rules and that any departure from the usual order of receiving documentary evidence was not prejudicial to rights of complaining party and that there was no excess or imperfection in the execution of their powers by the arbitrators. Code Civ.Proc. § 1288(c).

Appeal from Superior Court, City and County of San Francisco; Robert L. McWilliams, Judge.

In the matter of the application of the Pacific Vegetable Oil Corporation for an order directing arbitration of a dispute between the applicant and C. S. T., Limited. From an order denying applicant's motion to vacate an award in respondent's favor, the applicant appeals.

Order affirmed.

Prior opinion, 166 P.2d 31.

Manson, Allan & Miller and Dudley F. Miller, all of San Francisco, for appellant.

Lillick, Geary, Olson & Charles, Joseph J. Geary and Edwin L. Gerhardt, all of San Francisco, for respondent.

SHENK, Justice.

Pacific Vegetable Oil Corporation moved in the superior court pursuant to sections 1288 and 1290 of the Code of Civil Procedure to vacate an arbitration award made against it and in favor of C. S. T., Ltd. The motion was denied and the moving party appealed from the order.

The controversy arose over the failure of C. S. T., Ltd. to deliver a cargo of copra to Pacific Vegetable Oil Corporation. The latter, herein referred to as buyer, entered into contracts with the former, referred to as seller, for the purchase of two shipments of copra to be loaded in the Fiji Islands and delivered at San Diego for transshipment to Mexico. The first contract was executed on October 30, 1941, for copra to be loaded in the Fiji Islands on the S. S. Edna during November-December, 1941. That shipment was delivered to the buyer at San Francisco in the latter part of the following February. The second contract, dated November 8, 1941, called for a shipment of copra on the S. S. Edna (on her return from the previous voyage) during January-February, 1942. The quantity to be delivered was 2,200 long tons, at $79.50 U. S. currency per ton of 2,000 lbs. c. i. f. San Diego, payment to be made against a letter of credit established by the buyer in San Francisco.

The contracting parties were expressly subject to prevailing government regulations and to published rules of the Foreign Commerce Association of the San Francisco Chamber of Commerce. Rule 513 of the General Rules requires that any dispute arising under contract be submitted immediately to arbitration before a committee of the Foreign Commerce Association of the San Francisco Chamber of Commerce. Rule 557, relating specifically to copra, reads:

"Seller shall not be responsible to Buyer for delayed or non-shipment directly or indirectly resulting from a contingency beyond his control, such as embargo, act of government, strike, fire, flood, drought, hurricane, war, insurrection, riot, explosion, epidemic, pestilence, earthquake, accident, perils of the sea, tidal wave, or any other contingency beyond Seller's control not herein enumerated. If, due to any of the causes provided herein, shipment by steamer is not made within two months or by sailing vessel within three months after the contractual time for shipment, contract shall terminate with respect to any goods not then shipped."

Rule 515 provides that in the event the seller claims that delayed or nonshipment is due to a contingency beyond his control he must submit proof thereof.

Because of this country's entry into the second world war in December, 1941, and the delay in discharging the cargo under the first contract, the buyer in January, 1942, began making inquiries of the seller regarding the possibility of delivery under the second contract. The buyer received notice that the seller was not permitted to obtain an export permit for shipments of copra except to the British Ministry of Food at Canada, and for that reason the contract was cancelled. Considering the advices insufficient proof of inability to perform and upon the seller's refusal to arbitrate, the buyer on May 1, 1942, filed in the superior court a petition for an order directing the arbitration to proceed. The S. S. Edna arrived at the Fiji Islands on her return voyage in June, 1942. The order directing arbitration to proceed was issued on December 31, 1942.

The rules of the Foreign Commerce Association of the San Francisco Chamber of

Commerce relating to arbitration and appeal are as follows:

Arbitration is held before a committee appointed by the Chairman of the Foreign Commerce Association of the San Francisco Chamber of Commerce at the San Francisco office of the association (rule 500). The committee consists of three arbitrators, and the parties are bound by the decision of any two (rule 502).

Rule 505 reads: "Written statements of fact, together with written arguments thereon, must be presented in quadruplicate to the Foreign Commerce Association of the San Francisco Chamber of Commerce, which shall be submitted in their entirety to the arbitrators, but no oral evidence shall be given or personal appearance of the parties permitted unless requested by the arbitrators."

Rule 506: "Immediately upon receipt thereof, the Chairman of the Association shall submit a copy of the statement of fact to the respective parties to the arbitration, and each shall have the right to reply thereto."

There is no provision for a hearing in the presence of the parties or for the opportunity to examine witnesses. The signed request for arbitration (form prescribed by rule 504), binds the applicant to abide by the award and in the event of an adverse decision to make prompt settlement. It authorizes the arbitrators to be appointed and to "proceed without further notice."

Rule 508, prior to March, 1943, provided: "The findings and award of the arbitrators shall be in writing, signed by the arbitrators, *fully setting forth the facts of the case* and a copy thereof shall immediately be furnished the parties to the dispute." In March, 1943, the rule was amended by omitting the words in italics.

Rule 511 provides for an appeal to a board of appeal of the association, no member of which shall have been an arbitrator in the matter involved on the appeal.

Three arbitrators were appointed pursuant to the rules. The buyer and the seller each filed an opening statement. Each received a copy of the other's opening statement. Each filed a reply. The reply statements were not exchanged, there being no rule requiring it nor provision for presentation of further statements or arguments. The buyer did not see the seller's reply statement until after the arbitrators' award. The arbitrators' unanimous decision was made on July 29, 1943, and was based on the opening statements and replies thereto from which, however, all names and other matters of identification were removed before submission. The award stated: "Evidence submitted confirmed Seller's contention of termination of contract because of force majeure. The arbitrators, therefore, have no option but to find in favor of C. S. T. Ltd., and cancellation is hereby sustained."

The buyer noticed an appeal from the arbitration award to the Board of Appeal of the Foreign Commerce Association of the San Francisco Chamber of Commerce, and submitted a statement on appeal setting forth the grounds upon which it contended that the award was a nullity. Two grounds were set forth: (1) That there had been no compliance with rule 508 which it contended required the arbitrators to set forth fully the facts of the case; and (2) that the buyer had not had an opportunity in the arbitration proceeding to see or answer the reply statement of the seller which the buyer claimed constituted in fact the seller's case in chief rather than a reply to the buyer's opening statement.

After receiving a copy of the award the buyer wrote to the San Francisco Chamber of Commerce, Foreign Commerce Association, requesting that the award be corrected to conform to rule 508 as in effect at the date of the contract. In reply the buyer was advised that the rule had been amended in March, 1943, by deleting the provision calling for a full statement of the facts in the award, and that the arbitrators were guided by the rule as amended.

[1-4] It is not contended that the rule as amended was not duly adopted and published as an association rule. There is no general rule that arbitrators must find facts and give reasons for their awards. In fact, the rule and general practice is to the contrary. See In re Connor, 128 Cal. 279, 60 P. 862; Dugan v. Phillips, 77 Cal.App. 268, 246 P. 566. Apparently the rule was amended

to conform with the general practice. There is no doctrine which, after the date of a contract or during the pendency of an arbitration proceeding, precludes the application of a duly adopted amendment of a rule relating to a matter of procedure so long as the parties' substantial rights are not affected. Substantial rights are not affected by a change in a rule governing the form and extent of the decision on an award. The conclusion of the trial court that the amended rule 508 governed the form and extent of the arbitrators' decision is in harmony with the general doctrine that the extent of an order is a matter of procedure, and that procedural rules amended during the pendency of a proceeding apply as amended. Sour v. Superior Court, 1 Cal.2d 542, 36 P.2d 373. That the parties agreed to be bound by the published rules of the association does not alter the result in the absence, as here, of an express incorporation into the contract of specified rules. The general reference in the contract to published rules of the association did not constitute such an incorporation.

The buyer's principal contention before the board of appeal and at the hearing in the superior court was that since it was afforded no opportunity in the arbitration proceeding to answer the evidence and issues which it claimed were included for the first time in the seller's reply statement, to that extent it had been denied a full and fair hearing before the board of arbitrators, as a result of which the board refused to hear evidence and the award was a nullity.

[5] The merits of the controversy between the parties are not subject to judicial review. By section 1288 of the Code of Civil Procedure the superior court has power to vacate an award "(a) Where the award was procured by corruption, fraud or undue means. (b) Where there was corruption in the arbitrators, or either of them. (c) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehaviors, by which the rights of any party have been prejudiced. (d) Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award, upon the subject matter submitted, was not made."

It is not contended that there was any fraud or corruption in the procurement of the award or on the part of any of the arbitrators. But it is claimed that the conduct of the arbitrators in rendering an award upon the statements and replies filed by the buyer and seller without first affording the buyer an opportunity to answer the seller's reply, constituted ground for vacating the award pursuant to subdivisions (c) or (d) of said section 1288.

Although the merits of the award are not before us it becomes necessary to note the substance of the respective opening statements and replies as filed with the board of arbitrators in order to resolve the buyer's contentions in this regard.

In the buyer's opening statement it was disclosed that the ultimate destination of the copra was scheduled as Mexico; also that the Edna was delayed on the previous voyage and to the buyer's knowledge the vessel was not in a position to load the cargo under the second contract during January or February, 1942. "Knowing of this delay and being desirous of assisting" the seller in making the shipment, the buyer extended or offered to extend its letter of credit from time to time. On January 15, 1942, about five weeks after the signal for this country's entry into the war was touched off by the bombing of Pearl Harbor by the Japanese, and more than one month before the cargo on the previous voyage of the Edna had been discharged, the buyer sent a letter to the seller concerning information received earlier from the seller by telephone that the next trip of the Edna might be cancelled "because of the fact that the British were going to freeze Fiji Island copra for British Empire use." In that letter the buyer offered to sell the copra for domestic consumption if an export permit should be refused for copra to the United States for transshipment to Mexico. No reply was received to that letter. On March 18 the buyer by telephone communicated to seller its knowledge that the Edna was delayed due to repairs and again offered to extend its letter of credit. In that conversation the seller's representative repeated information said to have been previously communicated by telephone that shipment had been cancelled due to inability of seller to obtain an export permit from the government authorities. On March 19 the buyer wrote to the seller advising that the letter of credit had been extended and demanding a "formal statement from you as to just what you are going to do on this shipment on the Edna," and stating that "if you advise that you are not going to make this trip of the Edna we will, of course, be forced to take proper steps to protect our interests"; also offering to assist in eliminating difficulties. In a letter to the seller dated March 28 the buyer pointed out that it had never received a letter which seller assured (in telephonic communication) was being written "explaining that force majeure conditions existed." A letter of April 1, 1942, from the seller informed the buyer that representatives at Suva advised that "all of the copra from this area is being requisitioned by the Fiji Island Government, and that Government regulations absolutely prevent" the seller from either buying or exporting copra on its own account; that therefore, with regret, circumstances prevented fulfillment of the contract. Buyer's reply by letter of April 2d indicated its lack of faith in the reasons given, alleged the inadequacy of proof, called attention to rule 515 requiring seller to submit proof when nonperformance is claimed to be due to contingency beyond control, and demanded arbitration. The buyer sought damages in the sum of $57,800, the difference in the contract price and the alleged market price of $110 per ton in the United States in March, 1942.

The seller's opening statement comprises three pages in the transcript. It contains the general statement of the reasons for nonperformance, namely, that performance was impossible because the S. S. Edna was delayed by causes beyond the seller's control, i. e. repairs and war conditions, and because the government of the Fiji Islands refused at any time to grant the necessary export permit and in addition purchased all copra in the Fiji Islands. The statement outlined briefly the seller's efforts to obtain a permit, the vessel's delays known to buyer due to repairs and the necessity of proceeding on various phases of its voyage in convoy due to war conditions, the impossibility of loading the contracted copra no matter when the vessel called at Suva, the receipt, on January 8 of telegraphic notice from Suva representatives advising that the next trip to Mexico was refused and that it "must be Canada"; that buyer's efforts to guarantee "domestic" consumption were of no avail because the government refused permits for any destination other than Canada, that on February 18, 1942, the British Ministry of Food became the buyer of all copra in the Fiji Islands; that it became impossible to export copra even to Canada on behalf of private parties; that the contract was "therefore terminated because of the prevailing government regulations and because of the impossibility of performance."

The reply of the buyer to seller's opening statement alleged the seller's failure to submit evidence of the existence of any governmental action claimed to excuse performance, offering a claimed "inescapable" conclusion that no governmental action sufficient to constitute such an excuse ever took place. In purported refutation of the seller's statement that the export of copra to the United States was "impossible," the buyer attached proof that on May 23, 1942, 3,606 tons of copra were shipped from the Fiji Islands to San Francisco via the President Tyler (American President Lines) by private shippers in the Fiji Islands, one of whom, an affiliate of the seller, provided 780 tons of the quantity shipped on the vessel, and showing a price of $110 per ton c.i.f. San Francisco. The buyer also submitted proof of another shipment of copra in bulk loading at Rotuma (under jurisdiction of the Fiji Islands) via the Mexican steamer Marmex, on May 1, 1942, at a price of $59 per ton of 2,240 pounds f.o.b. Rotuma. The buyer also called attention to the fact that the contract, specifying "south sea" copra, was not limited to Fiji Island copra, and that no conditions of "force majeure" were indicated to prevent purchase elsewhere in the South Seas.

The seller's reply to the buyer's opening statement covers 17 pages in the transcript. The history of the contracts and government regulations is reiterated. Explanation of omission of documentary evidence prior to filing the reply statement was included, namely, the conditions of war, the lack of facilities to obtain copies of the documents, and the distances and conditions preventing rapid mail service. Copies of the telegraphic and other advices were included indicating the claimed government regulations forbidding private purchase of copra, or shipment anywhere except to Canada for government use, the originals of which were stated to be in the possession of seller's attorneys in San Francisco and were offered for exhibit upon request. With the exception of the extent of about one page, the seller's reply statement was devoted to commenting on the buyer's opening statement, to setting forth in full the facts and evidence relating to the government regulations claimed in seller's opening statement to prevent performance, and to discussion of the amount of damages alleged by the buyer. In addition, the seller included some statements concerning the effect of war conditions upon the delay of the vessel. These statements include the following:

"It must be understood that Buyer filed this suit even before the vessel had reached the Fiji Islands. It had previously been delayed as a result of war conditions, which were known to Buyer and which alone, considering the fact that the crew refused to sail on account of war conditions and the fact of other delays encountered because of the war, would have been sufficient to terminate the contract under Foreign Commerce Association Rule 557. The contract called for late January or February loading. Due to causes beyond Seller's control, recognized by Buyer, the vessel was unable to load before June. * * * In addition, during April, May and June the S. S. Edna was under the complete control of the government by whom it was directed where to load and where to go. * * * [F]urthermore, that in view of the war conditions delaying the vessel, which were recognized by Buyer, that from February on through June, including the time the ship did arrive in the Fiji Islands during June, 1942, it was not possible to ship copra even to Canada for private purposes. Certainly the foregoing 'prevailing Government Regulations,' which the contract was specifically made subject to, were sufficient to prevent performance, and even had no such proviso been contained in the contract the circumstances were sufficient to compel recognition of the principles of 'impossibility of performance' and 'force Majeure'."

The contention of the buyer is that it has never had an opportunity before the board of arbitrators to discuss the claimed new matter, namely, the *evidence* of government regulations theretofore generally alleged, nor to answer the issue asserted to have been raised for the first time in the reply statement, namely, the vessel's delay due to war conditions. The buyer claims that had that evidence and the issue been presented in the opening statement, it would have had an opportunity to point out the discrepancies in the evidence, and present proof of the movements of the ship in refutation of any alleged delay due to war conditions.

The following observations would seem to be a complete answer to the buyer's contentions:

[6, 7] Pursuant to rule 557 the seller was not responsible for nonshipment directly or indirectly resulting from a contingency beyond its control, such as an act of government or war; and in event of such contingency, the contract was automatically terminated if shipment was not made within two months after the contractual time for shipment.

"Force majeure," or the Latin expression "vis major," is not necessarily limited to the equivalent of an act of God. The test is whether under the particular circumstances there was such an insuperable interference occurring without the party's intervention as could not have been prevented by the exercise of prudence diligence and care. See National Carbon Co. v. Bankers' Mortgage Co., 10 Cir., 77 F.2d 614, 617, and cases cited. The superior court therefore could conclude that the board of arbitrators ascribed nonshipment to war, either directly causing delay in the vessel's movements, or indirectly by intervention of governmental action provoked by the necessities of war. War in either case was the "force majeure" or superior force which, in the aribitrators' unanimous opinion, sustained cancellation of the contract under the same rule which also provided that if, due to such contingency, shipment be not made within two months after the contractual time for shipment, the contract should terminate.

[8-10] The evidence to support the arbitrators' determination that conditions of "force majeure" existed which terminated the contract, was not required to be in any particular form. The rule (505) called for "written statements of fact, together with written arguments thereon." The parties' written statements of fact were therefore evidence. No special proof beyond the parties' written statements of fact was required. Therefore what would constitute proof of a contingency beyond the seller's control was a question for the arbitrators to determine. The form and sufficiency of the evidence, and the credibility and good faith of the parties, in the absence of corruption, fraud or undue means in obtaining an award, are not matters for judicial review.

[11, 12] In its opening statement the seller made specific mention of the impossibility of performance "because the S. S. [Edna] was delayed by causes beyond its [seller's] control, i. e. repairs and war conditions * * *"; that the ship "was still in the United States, having been delayed as a result of necessary repairs and the necessity of proceeding on various phases of its voyage in convoy due to war conditions; * * * [that the] necessary delay * * * was recognized by the Buyer. * * * However, regardless of the fact of the vessel's delay it became impossible * * * to load the contracted copra no matter when the vessel had called at Suva." The statement then continued with the alleged government regulations. In conclusion it stated that "The contract was therefore terminated because of the prevailing government regulations and because of the impossibility of performance." In its reply to the seller's opening statement the buyer chose to answer only those statements referring to claimed government regulations. The buyer had the opportunity then to refute the seller's claim of delay of the vessel due to repairs and war conditions, but it omitted any reply thereto until its contentions in respect thereof were included in the statement on appeal.

There is therefore no merit in the buyer's contention that the seller's opening statement did not contain evidence or present its case in chief on both grounds of prevention of performance. It we assume that the documentary evidence in support of the ground of governmental interference was not submitted until the seller's reply statement was filed, that fact alone does not call for a conclusion that the award must be set aside. Certainly it does not justify a finding that the arbitrators refused to hear or receive evidence, within the meaning of the rules or the decision in Christenson v. Cudahy Packing Co., 198 Cal. 685, 247 P. 207, relied on by the buyer. In that case the award was made without a copy of the seller's opening statement being presented to the buyer and without the latter's reply thereto, obviously a substantial noncompliance with the rules. Other cases relied on by the buyer not involving arbitration, or where there were dissimilar statutory provisions and procedure concerning arbitration, are inapplicable.

[13, 14] The buyer concedes that the use of the phrase "force majeure" in the arbitration award could refer to governmental action as a contingency beyond the seller's control. But the burden of its contention is that the employment of that phrase does not indicate whether the arbitrators placed their decision upon the conditions of war causing delay beyond the seller's control, or upon interference by governmental action; that, if the former, the contingency due to war conditions was raised for the first time in the seller's reply statement; or, if the latter, the evidence in support thereof was submitted for the first time in the seller's reply; and that in either event the buyer has had no opportunity to reply thereto and present its case fully. As has been shown, however, the procedure followed does not amount to a

refusal to hear evidence. The arbitrators received and considered both the opening and reply statements of both parties in which all of the evidence presented was included. Also, as hereinabove indicated it may not be said that the opening statement of the seller did not present its prima facie case on both defenses urged as excuse for nonperformance. Statements of fact concerning delay due to war conditions were substantially alike in both the opening and reply statements of the seller. The opening statement of the seller also contained evidence in the form of its statements of fact that governmental action prevented shipment of copra for private account. The documentary evidence of governmental action included in the seller's reply statement was in reality cumulative. Its delayed presentation to the arbitrators amounted merely to a reversal of the general procedure regarding the introduction of documentary evidence. In order that the claimed departure from the usual procedure be held to amount to misconduct of the arbitrators sufficient to vacate the award it must be shown that such departure had prejudiced the rights of the buyer. Code Civ.Proc., § 1288(c).

[15] As early as Manson v. Wilcox, 140 Cal. 206, 208-9, 73 P. 1004, in affirming an order denying a motion to vacate an arbitration award it was said that the misconduct or error complained of, to whatever class it might belong, must be of such character that the rights of the party complaining were prejudiced thereby. The purpose of the law in recognizing arbitration agreements and in providing statutory means of enforcement is to encourage persons to avoid delays by obtaining adjustment of their differences by an agency of their own choosing. This was pointed out in Utah Construction Co. v. Western Pacific R. Co., 174 Cal. 156, 159, 162 P. 631, 633, where it was also said: "The statutory provisions for a review thereof are manifestly for the sole purpose of preventing the misuse of the proceeding, where corruption, fraud, misconduct, gross error, or mistake has been carried into the award to the substantial prejudice of a party to the proceeding. * * * Therefore every reasonable intendment will be indulged to give effect to such proceedings." Citing authorities. See, also, Moore v. Griffith, 51 Cal.App.2d 386, 388, 124 P.2d 900; Dugan v. Phillips, supra, 77 Cal.App. 268, 278, 246 P. 566.

[16-18] The buyer made no request to present additional evidence. Neither before the board of appeal, where it purported to state additional facts and to make a complete answer to the reply statement of the seller, nor in the superior court, did the buyer indicate that it was possessed of further evidence in refutation of the seller's claims; or that if further evidence was available, what that evidence was, or that its effect would be to falsify the governmental action or other conditions of war which were alleged to constitute excuse for nonperformance. In the absence, as here, of any showing that further evidence in the possession of the buyer would disprove the seller's defense, there is no basis for an adjudication of prejudice. The fact that the buyer was not given a further opportunity to comment on and point out any claimed discrepancies and inconsistencies in the cumulative evidence included in the seller's reply statement, is not alone sufficient upon which to base a claim of prejudice. It must be assumed that the arbitrators were experienced men, capable of weighing the evidence and giving due consideration to opposing inferences. Furthermore, arbitrators are not bound by strict adherence to legal procedure and to the rules on the admission of evidence expected in judicial trials. In re Connor, 128 Cal. 279, 60 P. 862. Such a requirement would tend to defeat the object of the arbitration proceeding. Everett v. Brown, 120 Misc. 349, 198 N.Y.S. 462, 465.

[19, 20] The record shows that the arbitrators investigated and examined the original documents relied on by the parties. It also shows that the board of appeal examined and considered all of the evidence submitted to the arbitrators and the statement on appeal in coming to its unanimous decision upholding the arbitration award. The seller contends that the board of appeal had no power to hear evidence anew, or new or additional evidence, but was necessarily confined to the evidence

produced before the arbitration committee. The board of appeal unquestionably had the power to examine and consider, as it did in this case, the entire evidence and any proffered additional evidence for the purpose of determining whether any claimed misbehaviors or misconduct of the arbitrators prejudiced the rights of the complaining party. The record also shows affirmatively that the arbitrators reached a mutual, definite and final award without hindrance in any respect.

[21] We conclude that there was no denial to the buyer of its right to present its case; that there was no refusal to hear evidence; that there was a substantial compliance with the rules and that any departure from the usual order of receiving the documentary evidence was not shown to have prejudiced the rights of the complaining party; that there was no excess or imperfection in the execution of their powers by the arbitrators by which a mutual, final and definite award was prevented. There is therefore support for the conclusion of the trial court that the award should not be vacated.

The order is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

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76 Cal.App.2d 854

RAUER'S LAW & COLLECTION CO. v. HIGGINS.

Civ. 13178.

District Court of Appeal, First District, Division 1, California.

Nov. 21, 1946.

As Modified Dec. 19, 1946.

Hearing Denied Jan. 16, 1947.

1. Assignments 🔑89, 121

An assignment for collection vests legal title in the assignee which is sufficient to enable him to maintain an action in his own name but the assignor retains the equitable interest in the thing assigned.

2. Army and navy 🔑34

The purpose of the Soldiers' and Sailors' Civil Relief Act is to protect equitable as well as legal interests. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1–700, 201, 205, 50 U.S.C.A.Appendix, §§ 501–590, 521, 525.

3. Army and navy 🔑34

The section of the Soldiers' and Sailors' Civil Relief Act providing that period of military service shall not be included in computing any period or the bringing of any action or proceeding by or against any person in military service or against his heirs, executors, administrators, or assigns, applies only to actions not commenced at the time of the passage of the Act in 1940 and affords no protection to an assignee who filed an action in June, 1940. Soldiers' and Sailors' Civil Relief Act of 1940, § 205, 50 U.S.C.A.Appendix, § 525.

4. Trial 🔑404(1)

A finding that assignor's military service interfered with assignee's ability to prosecute case was in effect a determination that it would have been impracticable or futile to bring case to trial during the three years that assignor was in the military service. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A. Appendix, § 521.

5. Army and navy 🔑34
Dismissal and nonsuit 🔑60(3)

The purpose of the Soldiers' and Sailors' Civil Relief Act of 1940 was to alleviate the critical condition that arose on the volunteering or drafting of men and women for military service and such purpose may be considered in construing state codal provision providing for dismissal actions for want of prosecution. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1–700, 201, 205, 50 U.S.C.A.Appendix, §§ 501–590, 521, 525; Code Civ.Proc. § 583.

6. Dismissal and nonsuit 🔑79

Where motion to dismiss for want of prosecution was resisted on ground that plaintiff's assignor had been in military service more than three years during pendency of action which was brought to trial five years and 95 days after complaint was filed and six months after assignor was released, denial of motion contained implied finding that assignor's military service rendered it futile to proceed in his absence and fact that no motion for a continuance was made under the Soldiers' and Sailors' Civil Relief Act was immaterial. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1–700, 201, 205, 50 U.S.C.A.Appendix, §§ 501–590, 521, 525; Code Civ.Proc. § 583.

7. Army and navy ⚿34

Under the Soldiers' and Sailors' Civil Relief Act the court has no discretion in granting or refusing to grant a stay on account of absence in the military service but only in determining whether the service man's or the litigant's rights will be materially affected by a denial of the stay. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1–700, 201, 205, 50 U.S.C.A.Appendix, §§ 501–590, 521, 525.

8. Appeal and error ⚿1008(1)

Whether the appearance or nonappearance of assignor in military service would or would not prejudice determination of action brought by assignee was a question of fact for trial court on motion to dismiss action for want of prosecution. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1–700, 201, 205, 50 U.S.C.A. Appendix, §§ 501–590, 521, 525; Code Civ. Proc. § 583.

9. Dismissal and nonsuit ⚿60(3)

Where plaintiff's assignor had been in military service more than three years during pendency of action, which was brought to trial 5 years and 95 days after complaint was filed and 6 months after assignor was released, denial of motion to dismiss for want of prosecution was not an abuse of discretion. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1–700, 201, 205, 50 U.S.C.A.Appendix, §§ 501–590, 521, 525; Code Civ.Proc. § 583.

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt and Andrew R. Schottky, Judges.

Action by Rauer's Law & Collection Company against Claude C. Higgins to recover attorney's fees for services rendered by plaintiff's assignor. From a judgment for $651.25 and interest for plaintiff, the defendant appeals.

Affirmed.

F. E. Hoffmann, of San Mateo, and Murray Draper, of San Francisco, for appellant.

Jerome L. Schiller, of San Francisco, for respondent.

WARD, Justice.

Defendant appeals from a judgment rendered against him for $651.25 and interest, and presents the appeal upon a clerk's transcript and a settled statement of oral proceedings. The action was brought by plaintiff as assignee to recover attorney's fees for services rendered to defendant by plaintiff's assignor. The complaint was filed June 21, 1940, and the action was not brought to trial until September 24, 1945, at which time defendant moved to dismiss the action under the authority of section 583 of the Code of Civil Procedure, which provides that "Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended." No written stipulation had been made extending the five year period, but plaintiff resisted the motion on the ground that its assignor, the real party in interest, had been in military service for some three years of the five year period, which time is claimed should be deducted from the five year period. The court denied the motion, and the cause proceeded to trial, plaintiff recovering judgment as prayed. Defendant does not on this appeal attack the judgment on its merits, the sole point urged for reversal being that the trial court erred in denying his motion to dismiss under the provisions of sec. 583, supra.

The record shows the following: The complaint, as stated, was filed June 21, 1940. An answer was filed by defendant's then attorney on July 27, 1940. On August 9, 1940, plaintiff filed a memorandum of motion to set the cause for trial, and, in compliance with a demand made by defendant for an itemized statement of the account sued upon, filed a bill of particulars setting forth the details of the account. On May 18, 1942, plaintiff filed a notice requesting defendant to appoint an attorney in the place of his former one, who had died, and that same day the notice of the appointment of defendant's present attorney was filed. Also on that day plaintiff's assignor enlisted in the armed forces. On June 1, 1942, another memorandum of motion to set the cause for trial was filed. On May 14, 1945, nearly three years later, another memorandum to set the cause for trial was filed. In the meantime, at the end of March, 1945, plaintiff's assignor was released from the army. The cause came on for trial on September 24, 1945, five years and 95 days after the complaint was filed.

[1] At oral argument before this court it was suggested that an inference was possible that an assignment to a collection agency is an assignment for collection only and not an absolute assignment. Counsel for appellant agreed that possibly such an assumption was well based and accepted the word of counsel for respondent that it was an assignment for collection. The nature of an assignment for collection is treated by the Supreme Court in Harrison v. Adams, 20 Cal.2d 646, 650, 128 P.2d 9, 12, as follows: "An assignment for collection vests legal title in the assignee which is sufficient to enable him to maintain an action in his own name, but the assignor retains the equitable interest in the thing assigned. National Reserve Co. v. Metropolitan Trust Co., 17 Cal.2d 827, 112 P.2d 598; Morrison v. Veach, 190 Cal. 507, 213 P. 945; Bechtel v. Baglieto, 13 Cal.App.2d 495, 57 P.2d 192; Elam v. Arzaga, 122 Cal.App. 742, 10 P.2d 805; Koepple v. Morrison, 84 Cal.App. 137, 257 P. 590. Such an assignee has been referred to as the trustee or agent of the assignor (Weiner v. Luscombe, 19 Cal.App.2d 668, 66 P.2d 151; Elam v. Arzaga, supra; Toby v. Oregon Pac. R. Co., 98 Cal. 490, 33 P. 550), and a fiduciary relationship exists between them. Elam v. Arzaga, supra."

[2] Plaintiff's assignor is the owner of an equitable interest in the present cause. The purpose of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.A.Appendix, §§ 501–590, is to protect equitable as well as legal interests. The Supreme Court of Arizona in Twitchell v. Home Owners' Loan Corporation, Ariz., 122 P.2d 210, 212, describes the act in the following terms: "It was meant to protect the interests of those who were called to the defense of their country and who, for that reason, were unable to keep up the payments upon obligations which they had incurred previous to their being called into service. The Act has always been upheld as a proper exercise of the war powers of the federal government. We think it would violate its spirit if it were held to protect only legal, and not equitable, interests."

[3] Respondent cites section 525 as well as section 521 of the Soldiers' and Sailors' Civil Relief Act in support of its contention that the motion to dismiss was properly denied. Section 525, unlike section 521, extends to "assigns" of the service man: "The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding * * * by or against any person in military service or by or against his heirs, executors, administrators, or assigns * * *." This section of the act applies only to "actions not then commenced", i. e., at the time of the passage of the act in 1940. Breakstone v. Giannini, 70 Cal.App.2d 224, 228, 160 P.2d 887, 889. Since the present action was filed in June, 1940, section 525 cannot operate in respondent's favor.

[4] Section 521, the pertinent portions of which are quoted herein, cannot alone support respondent's position. That section, by its terms, is limited to applications made during the time of a party's military service and within sixty days thereafter. Here the plaintiff's assignor did not seek relief until some 95 days after his military

service had terminated. But section 521 is important in determining that had plaintiff's assignor sought relief during the three years of his military service such relief would have been granted because the trial court has inferentially found that the military service of the real party in interest materially affected his ability to prosecute the case. As stated hereinafter, had the defendant sought to bring this cause to trial during those three years, the trial court, on such a finding, would have been compelled to grant a continuance. Thus the finding that plaintiff's assignor's military service interfered with his ability to prosecute the case is in effect a determination that it would have been "impracticable" or "futile" to bring it to trial during those three years. This case falls directly within the exception to section 583 noted in cases cited hereafter. This point was necessarily involved in Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 168 P.2d 665, hereafter discussed.

[5] Further consideration of the provisions of the Soldiers' and Sailors' Civil Relief Act is necessary only to determine the applicability of state statutes. The purpose of the federal act was to alleviate the acute and critical condition that arose from the sudden call to arms of the men and women who volunteered or were liable to selection or draft for military service in the recent war. To that extent, though the federal act technically may not be controlling its purpose may be considered in construing state statutes providing for the dismissal of actions based upon delay in prosecution. The present motion is primarily predicated on California Code of Civil Procedure, sec. 583.

Many decisions have recognized exceptions to the five year rule other than the ones specified in the section. Kruly v. Superior Court, 122 Cal.App. 458, 10 P.2d 178; Estate of Morrison, 125 Cal.App. 504, 14 P.2d 102; Carmichael v. Superior Court, 55 Cal.App.2d 406, 130 P.2d 725; Westphal v. Westphal, 61 Cal.App.2d 544, 143 P.2d 405; Kinard v. Jordan, 175 Cal. 13, 164 P. 894; Allyne v. Superior Court, 200 Cal. 661, 254 P. 564; Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153; Judson v. Superior Court, 21 Cal.2d 11, 129 P.2d 361; Pacific Greyhound Lines v. Superior Court, supra. The present case may be determined upon the authority of the case last cited.

The proceeding in the Pacific Greyhound case was in mandamus to compel the trial court to dismiss an action under section 583, Code Civ.Proc., for failure of the plaintiffs to bring their personal injury action to trial within the five year period. One of the defendants had gone into the military service fifteen months after the action was filed, and he was still in the service when the motion to dismiss was made. The action therein was filed on January 29, 1940, and the motion to dismiss was made on February 21, 1945, five years and twenty-three days after the action was filed. In resisting the motion, the plaintiffs' affidavit alleged that it "was impossible, impractical and a futile gesture" to proceed with the trial in the absence of the defendant who was in the service, and that his presence was necessary "to properly prosecute this action." The trial court denied the motion to dismiss. The Supreme Court refused to issue the writ of mandamus to compel the dismissal, saying 28 Cal.2d at pages 66, 168 P.2d at page 668: "In support of their allegation that it was 'impossible, impractical and a futile gesture' to bring the case to trial while defendant * * * was serving in the armed forces plaintiffs rely upon section 521 of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.A.Appendix, to the effect that 'At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and *shall, on application to it by such person or some person on his behalf, be stayed* as provided in this Act, *unless, in the opinion of the court,* the ability of plaintiff to prosecute the action or the defendant to conduct his defense is *not materially affected* by reason of his military service. (Italics added.)' * * *

"The Soldiers' and Sailors' Civil Relief Act, supra, leaves discretion in the trial court in resolving the issue as to whether 'the ability of plaintiff to prosecute the action or the defendant to conduct his defense is * * * materially affected by reason of his military service' but it, in effect, places the burden of proof upon the party resisting a postponement * * *. *The real issue before it was the question as to whether it was 'impractical and futile' to proceed with the case during the military service of the defendant.*" (Last italics added.)

The court further ruled 28 Cal.2d at page 65, 168 P.2d at page 667: "The sole question necessary for us to determine is whether petitioners have established that the evidence before the trial court on the motion to dismiss was as a matter of law insufficient to sustain its implied finding that for more than twenty-three days of the calendar five-year period it was 'impossible,' or 'impracticable and futile' either in an objective sense or 'due to excessive and unreasonable difficulty or expense,' to proceed to trial."

[6, 7] The applicability of this case cannot be avoided by the fact that here the plaintiff's assignor was mustered out of the army at the end of March, 1945, six months before the case was tried, whereas in the Pacific Greyhound case one of the defendants was still in the service when the motion to dismiss was made. According to the rule laid down by the Pacific Greyhound case, if the evidence is sufficient to establish that for more than 95 days of the calendar five year period it was "impossible," or "impractical and futile" to proceed to trial, the trial court's denial of the motion to dismiss must be upheld, for the reason that those 95 days are deducted from the five year period. By its denial of the motion to dismiss the trial court here found inferentially as a matter of fact that the absence of the plaintiff's assignor on account of his military service materially affected the prosecution of the action and that it was impractical and futile to proceed with the case in his absence. This implied finding is amply sustained by the testimony of plaintiff's assignor to the effect that he was the only one familiar with the services rendered to the defendant; that he was in the military service from May 18, 1942, until the end of March, 1945, and that his duties were such that he was unable to attend the trial of the action until his discharge from the service.

Under the rule of the Pacific Greyhound case, the fact that a stay had not been applied for, or that one was not actually granted, on the court's own motion, does not change the rule. By the trial court's denial of the motion to dismiss, it appears that the trial court concluded that the military service of the plaintiff's assignor materially affected the prosecution of the action; hence a stay would have been granted had it been applied for. The discretion of the court lies not in granting or refusing the stay, but only in determining whether the service man's or any litigant's rights will be materially affected by a denial of the stay. Boone v. Lightner, 319 U.S. 561, 63 S.Ct. 1223, 87 L.Ed. 1587.

In his reply brief, appellant suggests that the testimony of plaintiff's assignor could have gone in by deposition. A similar contention was made in Davis v. Wyche, 224 N.C. 746, 32 S.E.2d 358. In considering the effect of section 521 on the service man's right to a stay, the court (32 S.E.2d at page 360) quoted as follows from Bowsman v. Peterson, D.C., 45 F.Supp. 741: "'Within due limitations, he (defendant) ought to be allowed to testify personally before the jury rather than through the notoriously indifferent medium of deposition. * * * He should, if reasonably possible, have the opportunity to be personally before the court and the jury during the entire progress of his trial, manifesting his interest in its event and allowing those charged with the burden of decision to observe him, either for his advantage or to his possible detriment.'"

[8, 9] In the majority opinion of Johnson v. Johnson, 59 Cal.App.2d 375, 383, 139 P.2d 33, 37, it is stated (petition for hearing by the Supreme Court denied) that "Doubtful cases should be resolved in fa-

vor of the service man." In the present case the appearance or non-appearance of Lieutenant Colonel Flynn, the assignor, as a witness, might or might not prejudice the determination of the material issues presented in the pleadings. This was a question of fact to be decided by the trial court. Royster v. Lederle, 6 Cir., 128 F.2d 197. The present record, as presented, does not show an abuse of discretion.

It should be noted that this conclusion is in accord with the legislative policy as enunciated in sec. 583.5 of the Code of Civil Procedure adopted in 1945, but effective too late to be here applicable.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

Hearing denied; EDMONDS, J., dissenting.

76 Cal.App.2d 862

DELAFIELD v. SEARLE AERO INDUSTRIES, Inc., et al.

Civ. 15206.

District Court of Appeal, Second District,

Division 1, California.

Nov. 21, 1946.

Rehearing Denied Dec. 11, 1946.

Hearing Denied Jan. 16, 1947.

1. Master and servant 🔑70(2)

Where plaintiff's contract to serve as salesman for corporate defendant provided that he was to receive commission on sale of airplane parts to airplane builders in his territory only upon showing of sufficient diligence in opinion of sales director to entitle him to commission upon a particular project, and that amount of the commission, ranging from 2½ per cent. to 8 per cent. of amount of the sale, should be fixed by sales director, plaintiff could not recover more than nominal damages in action to recover commissions allegedly due under the contract.

2. Reference 🔑19

In action to recover salesman's commissions, where trial judge was ready to receive evidence to support plaintiff's claim of a commission as to any specific order, and no such evidence was offered, refusal of plaintiff's request that a referee be appointed to examine records of defendant corporation to determine orders upon which plaintiff was entitled to a commission was not an abuse of discretion.

3. Appeal and error 🔑980
New trial 🔑93

The granting of a new trial by reason of death of reporter before completion of the transcript is a matter resting in trial court's discretion, and its action thereon will not be disturbed unless an abuse of such discretion clearly appears. Code Civ. Proc. § 953e.

4. New trial 🔑93

Denial of plaintiff's motion for a new trial by reason of death of reporter before completion of the transcript was not an abuse of discretion, where before his death reporter furnished 460 pages of the transcript, which included all of plaintiff's case in chief and plaintiff's cross-examination of two of the individual defendants under statute, and balance of the record on appeal was made up in form of a settled statement based upon partial transcriptions of the shorthand notes by other reporters and notes taken by trial judge. Code Civ.Proc. §§ 953e, 2055.

◆

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by Clifford G. Delafield against Searle Aero Industries, Inc., Vincent Anthony Marco, and others, to recover sum alleged to have been earned by plaintiff as commissions while in defendants' employ, wherein the defendant Vincent Anthony Marco filed a cross-complaint. From a judgment that plaintiff recover nothing from the individual defendant and that he recover the sum of $1 from the corporate defendant, the plaintiff appeals.

Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

James B. Tucker, of Santa Ana, for respondents.

WHITE, Justice.

This action was instituted in March, 1943, by the filing of a complaint for money for services rendered, in which complaint plaintiff alleged that the defendant corporation and the individual defendants had theretofore employed plaintiff as a "production co-ordinator" of the defendant Searle Aero Industries, Inc., and agreed to pay him 5% of any and all sales made through the efforts of plaintiff, such compensation to be paid immediately upon delivery of the merchandise; that plaintiff sold $461,980.21 worth of merchandise, all of which had been delivered, and was entitled to the sum of $23,099.01; that $13,217.55 had been paid, leaving a balance due of $9,881.46. The defendants Marshall O. Searle and Gladys Searle Marco, by their joint answer, denied the agreement of employment alleged by plaintiff, admitted payment by defendant Vincent Anthony Marco to plaintiff of at least the sum of $13,217.55, and as a separate defense alleged the execution of an accord and satisfaction by the plaintiff and the defendant Vincent Anthony Marco on January 14, 1943. The defendant Searle Aero Industries, Inc., filed a similar answer, also pleading the accord and satisfaction. The answer of defendant Vincent Anthony Marco contained the same denials as the other answers, but did not plead the accord and satisfaction. By an amended cross-complaint Vincent Anthony Marco charged plaintiff with repudiation and breach of the accord and satisfaction and sought to recover the consideration paid by the cross-complainant thereunder.

Upon the first trial of the action, in November, 1943, the trial court granted a nonsuit. This was reversed on appeal. Delafield v. Searle Aero Industries, 66 Cal. App.2d 710, 152 P.2d 791. At the same trial it appears from the minutes that "pursuant to the statement made by the cross-complainant," the cross-complaint was dismissed.

At the second trial of the action plaintiff was permitted to file an amended and supplemental complaint in which the amount of commissions claimed by him was increased to $15,135.60. After submission of the cause upon the second trial, the court made findings of fact and conclusions of law and entered its judgment that plaintiff recover nothing from the individual defendants and that he recover from the defendant Searle Aero Industries, Inc., the sum of $1. From such judgment the present appeal is prosecuted.

The factual background of this litigation may be summarized as follows: Vincent A. Marco was "sales director" of the defendant Searle Aero Industries, Inc. In June, 1941, negotiations were in progress between Marco and plaintiff looking toward the employment of plaintiff in a sales capacity. Plaintiff delivered to Marco a letter, dated July 3, 1941, stating his understanding of their agreement was that he was to have a weekly drawing account of $50 and his commissions were to be "a minimum of 2½% and a maximum of 8% of the gross volume of annual sales." After further negotiation, however, plaintiff addressed another letter, dated July 9, 1941, to the defendant corporation, attention of Mr. Marco, the pertinent portions of which are as follows:

"I wish to confirm our understanding of July 3rd with reference to my employment with Serle Aero Industries, Inc.

* * * * * *

"Third, I shall make daily report wherein shall be included my work of the preceding day, names, telephone numbers and individuals whom I have seen, together with a report of discussions and possibilities. I am to have a drawing account of Fifty Dollars per week, which shall be charged against my commissions. My commissions shall be from 2½% to 8% of the gross volume of actual sales made by me, the amount of commissions to be determined by the Sales Director, Mr. Vincent A. Marco.

"I understand that I am being employed on an experimental basis and can continue on the arrangement above indicated for a period of four weeks, at which time if satisfactory to both parties we shall enter into a mutual agreement.

"It is understood that my authority is that of salesman with no specific power to bind or contract for the Searle Aero Industries, Inc. unless with the written approval of Marshall Searle and Mr. Vincent A. Marco.

"There are no other verbal understandings other than herein written.

* * * * * *

"The above is confirmed.

"Searle Aero Industries, Inc.
"By Vincent A. Marco, Sales, Director."

Under this arrangement, the plaintiff went to work. On December 20, 1941, Mr. Marco wrote plaintiff as follows:

"Confirming my conversation with you of recent date, please be advised as follows:

"That the records of Searle Aero Industries, Inc., and any and all subsidiary companies reflect that there has been sold to the Lockheed Aircraft Company, a gross volume of business totaling $23,911.27 up to and including December 20, 1941, on which amount you are to be paid a commission of two (2%) per cent.

"The records further indicate that all other business, exclusive of the Lockheed Aircraft Company business, up to and including December 20, 1941, sold by you, amounts to $38,868.93, on which amount you are to be paid a commission of four (4%) per cent.

"* * * (Then follows a statement of account.)

"The above figures indicate a correct record of any and all commissions due you and advancements made to you to and including December 20, 1941, and is in accordance with our understanding and agreement."

Acceptance of this statement and a release was made in writing by the plaintiff.

Difficulties between the parties arising in the latter part of 1942 culminated in a conversation in December of that year, at which plaintiff presented to Mr. Marco some figures purporting to represent sales made by the corporation in 1942 upon which he claimed commissions. On January 14, 1943, the following accord and satisfaction was entered into between plaintiff and the defendant Vincent A. Marco;

"Whereas, during the year 1942 the undersigned, Cliff G. Delafield, was and still is employed by the undersigned, Vincent A. Marco, as a Sales Representative for the Searle Aero Industries, Inc., for whom said Vincent A. Marco was at all said times the Sales Director and from whom said Cliff G. Delafield's employment was directly obtained; and

"Whereas, in and during the year 1942 the said Cliff G. Delafield, as such sales representative, sold certain goods, wares and merchandise manufactured by said Searle Aero Industries, Inc., a California corporation, in the sum of Two Hundred Fifty Two Thousand Three Hundred Fifty and 90/100 ($252,350.90) Dollars, all of which have been delivered to the purchasers thereof and for which said Cliff G. Delafield was and is to receive a commission of five percent (5%) thereof, less advances of money heretofore made to his account in the sum of Fifty Two Hundred ($5200.00) Dollars, leaving a balance due said Cliff G. Delafield for his services as such sales representative for the year 1942 for goods, wares and merchandise sold and delivered, in the sum of Seven Thousand Four Hundred Seventeen and 55/100 ($7,417.55) Dollars; and

"Whereas, certain goods, wares and merchandise were also sold by said Cliff G. Delafield during said year 1942 which have not as yet been delivered to the purchasers thereof; and

"Whereas, certain sales of such goods, wares and merchandise have been or may be made by the said Cliff G. Delafield between January 1, 1943 and February 1, 1943; and

"Whereas, the undersigned parties hereto desire to have a full and complete Accord and Satisfaction, and a full and complete settlement of all matters arising from the employment of said Cliff G. Delafield as such sales representative by said Vincent A. Marco as said Sales Director for said Searle Aero Industries, Inc., and those interested therein;

"Now, therefore, in consideration of the sum of Seven Thousand Four Hundred Seventeen and 55/100 ($7,417.55) Dollars, evidenced by Check No. 4530 drawn for such amount upon the Citizens National Trust and Savings Bank (Hollywood-Mc-

Cadden Branch), the receipt of which is hereby acknowledged by the undersigned Cliff G. Delafield, and which sum comprises the entire amount due said Cliff G. Delafield for commissions upon said goods, wares and merchandise by him sold during the year 1942 and by said Searle Aero Industries, Inc., a California corporation, delivered during said year; and in further consideration of the agreements herein contained upon the part of said Vincent A. Marco, the said Cliff G. Delafield does hereby release and discharge the said Vincent A. Marco, as an individual and as the Sales Director of said Searle Aero Industries, Inc., and also releases and discharges said Searle Aero Industries, Inc., a California corporation, Marshall O. Searle and Mrs. Gladys M. Marco, from any and all claims on the part of said Cliff G. Delafield of all kinds and description, and all liabilities growing out of said Cliff G. Delafield's employment as heretofore set forth, except as expressly reserved and stated herein.

"The undersigned Vincent A. Marco, contracts and agrees that all sales of such goods, wares and merchandise made by the said Cliff G. Delafield during the year 1942 and up to February 1, 1943, which have not been delivered or cancelled, will upon delivery to the purchasers thereof account to said Cliff G. Delafield for his said five percent (5%) commission thereon.

"The undersigned Vincent A. Marco will, on or after February 1, 1943, submit a contract of employment to the said undersigned Cliff G. Delafield for his forthwith rejection or acceptance, it being understood that unless said contract is accepted by said Cliff G. Delafield his employment is terminated and at an end on February 1, 1943, which contract, among other things, will be for a period of one year, designate the territory and commissions and contain other provisions, including the right of the undersigned Vincent A. Marco, or Searle Aero Industries, Inc., to cancel and terminate the same at their option upon thirty (30) days' written notice, it being further understood that the employment of said Cliff G. Delafield has been and if re-employed, will be directly by the said Vincent A. Marco and not by the Searle Aero Industries, Inc.

"It is understood by the parties hereto and contracted and agreed by said Cliff G. Delafield that there are no other contracts or agreements between him, the said Cliff G. Delafield, and said Vincent A. Marco nor between him and any of the other parties mentioned herein.

"The said Cliff G. Delafield further certifies and states that he has examined and has personal knowledge of his said commission account mentioned herein and that the figures and amounts stated therein of the balance due and advances made him are true and correct and he hereby waives any further accounting thereof. * * *"

As to the terms of plaintiff's employment, the trial court found that the defendant Vincent A. Marco, as sales director of the defendant corporation and acting on its behalf, employed plaintiff as a salesman, and that his compensation was to be "based upon the gross sales actually made by the plaintiff of the products of the defendant corporation," the rate of such commission to be fixed by the sales director at not less than 2½% and not more than 8% of the amount of the sales actually made by the plaintiff; that plaintiff was paid in full for sales made up to December 20, 1941.

The court further found: "That between the 21st day of December, 1941, and the 31st day of December, 1942, the defendant corporation received orders for its products and sold the same in a total amount much greater than $252,350.90. That included in this total amount were sales made by the plaintiff in the year 1942 of products of the defendant corporation, which products were delivered by the 31st day of December, 1942, to the purchasers thereof, in the amount of $252,350.90. That said sales director fixed 5 per cent as the commission to be paid the plaintiff on the sales he had made which were so delivered, and the same was paid to him and accepted by him in full satisfaction of the commissions due him for all sales made by him during the year 1942 of the products of the defendant corporation which were delivered prior to January 1, 1943."

The court further found: "That products of the defendant corporation were sold by the plaintiff between the 21st day of December, 1941, and the 31st day of December, 1942, which were not delivered until after the 31st day of December, 1942, and said Sales Director did fix the rate of 5 per cent as the rate of the commission to be paid the plaintiff for said sales, but that there is no evidence of the amount of such sales made by the plaintiff, and it is therefore found that the plaintiff sold products of the defendant corporation between the 21st day of December, 1941, and the 31st day of December, 1942, which were delivered after the 31st day of December, 1942, in the amount of twenty dollars. That no commission has been paid * * * That the evidence does not disclose whether or not the plaintiff made any sales of the products of the defendant corporation at any time during the year 1943, and hence it is found that the plaintiff made no sales during said year."

As conclusions of law, the court found that the individual defendants "have breached no legal duty they owed to the plaintiff" and were entitled to a judgment that as to them plaintiff take nothing; that the defendant corporation "was under the legal duty of paying the plaintiff a commission at the rate of 5 per cent based upon sales of its products which were made by him prior to December 31 of the year 1942, but which were not delivered until after that date, but that, in the absence of any evidence from which the amount of such sales may be ascertained, the plaintiff is entitled to judgment against the defendant corporation in a nominal sum only; that is, in the sum of one dollar."

Appellant's first ground for reversal is that under the undisputed evidence he was entitled to a judgment for $15,135.60. Appellant calls attention to his own testimony that he was known as a "co-ordinator"; that he made regular calls on various airplane builders, particularly in Southern California, from which builders defendant corporation received orders for merchandise; also that the evidence of all parties was to the effect that it was the practice for the builders to ask various manufacturers for bids and then determine which manufacturer should get the order; that such orders were usually sent directly to the manufacturer. Mr. Searle testified that no orders were given directly to Mr. Delafield, so far as he knew. In view of this, it is argued, it was not possible for plaintiff to obtain the orders himself, and therefore he was entitled to a commission on all orders from the airplane builders upon whom he had been calling and whom he had been "servicing." In this connection, appellant also states that he relies not only on his own testimony but "more heavily on the testimony of Mr. Marshall O. Searle." The testimony quoted by appellant was to the effect that he did not check the statement of approximately $252,000 which Mr. Delafield presented at the time of the accord and satisfaction; that he believed the statement was gotten through the plant; that he assumed someone had checked it. Mr. Searle further testified:

"Q. * * * You testified here for the year's business ending December 31, 1942, you made some settlement with Mr. Marco? A. Yes.

"Q. Was that settlement that you made with him based upon the same statement that Mr. Delafield prepared? A. No. * * * Mr. Marco's arrangement with the company is on the gross business and not on that territory. * * *

"Q. But Delafield's is on the territory, on that territory? A. On certain accounts, yes, sir.

"Q. The accounts he went around and visited? A. Yes.

"* * * A. Do you mean that Mr. Delafield called on Consolidated?

"Q. That was one of his accounts? A. Yes.

"Q. That was in his territory? A. I do not mean he has the exclusive—

"Q. Just a minute, please. But, that is one of the accounts, the Consolidated Aircraft? A. That is right; he serviced them."

The witness then named about fifteen firms in Southern California upon whom Mr. Delafield called.

Appellant cites authorities holding, in substance, that testimony which is not inherently improbable and is not impeached or contradicted by other evidence should be accepted as true; that such unimpeached testimony may not be arbitrarily disregarded by the trial court, and that therefore it was the plain duty of the trial court to accept the testimony of Mr. Searle to the effect that plaintiff was to be paid a commission on all orders from the airplane builders upon whom he called.

[1] The trial court, however, found that plaintiff was entitled to commissions only upon sales actually made by him. There is substantial evidence to support this finding, the testimony of defendant Marco and the uncontradicted evidence of the documents hereinbefore set forth containing the phrases, "actual sales made by me," "business * * * sold by you," and, in the accord and satisfaction, the agreement to pay a 5% commission on future delivery "upon all sales of such goods, wares and merchandise made by the said Cliff G. Delafield * * * which have not been delivered or cancelled."

We are persuaded it would be a fair summary of the evidence to say that the parties at no time came to a specific agreement upon which an accounting could be based—that they at no time arrived at an understanding as to what the basis of commission was to be. On the contrary, the evidence would support only a finding that so far as commissions were concerned the plaintiff, Mr. Delafield, was bound by the decision of the defendant Mr. Marco, who was invested with authority to determine not only the amount of commissions to be paid but also whether a particular salesman had earned any commission. Nowhere in the testimony of any party or other witness is there anything to disclose just how a salesman who claimed a commission was to prove his right thereto. Nothing in the evidence disclosed any form of record-keeping that would protect a salesman should his claims be contested by the sales director, Mr. Marco. The general theory of operation over a long period of time seems to have been that if a salesman made a sufficient showing of diligence upon a particular project he had earned a commission (subject to Mr. Marco's views as to the amount). If plaintiff chose to put up with such an arrangement, no good reason appears why he should now be permitted to complain. He was at liberty to resign long before he secured the accord and satisfaction. It is not the function of a court to remake a contract entered into by competent parties.

[2] Some of the foregoing observations apply equally well to appellant's second contention—that the trial court erred in denying appellant's request that a referee be appointed to examine the records of the defendant corporation and determine therefrom what proportion of its orders taken in 1942 and delivered subsequent to the accord and satisfaction were orders upon which plaintiff was entitled, under the accord and satisfaction, to a commission. This contention is without merit. The learned trial judge was ready at all times to receive any evidence to support plaintiff's claim of a commission as to any specific order. No such evidence was offered. There being no evidence, there was nothing for a referee or auditor to examine. Moreover, the matter was one calling for the discretion of the trial judge. 22 Cal. Jur. 689. In the instant case the trial judge examined all the evidence and concluded that no useful purpose would be served by a reference. In this determination, we are convinced, he did not err.

[3, 4] Finally, appellant urges that a new trial should have been granted under section 953e of the Code of Civil Procedure by reason of the death of the reporter before the completion of the transcript. It is settled that the granting of a new trial upon this ground is a matter resting in the sound discretion of the trial court, and its action will not be disturbed unless an abuse of this discretion clearly appears. Smith v. Orange Belt Supply Co., 58 Cal.App.2d 848, 137 P.2d 845; Conlin v. Coyne, 19 Cal. App.2d 78, 64 P.2d 1123. Before his death the reporter furnished 460 pages of transcript, which included all of plaintiff's case in chief. These 460 pages included plaintiff's cross-examination of the defendants Marshall O. Searle and Vincent A. Marco under section 2055 of the Code of Civil Procedure. The balance of the record on appeal, consisting of defendants' evidence and some rebuttal by plaintiff, was made up in the form of a settled statement based upon partial transcriptions of the shorthand notes by other reporters and notes

taken by the trial judge. In the circumstances of the present case no prejudice has resulted to appellant; in fact, appellant has made no attempt to point out wherein he has been prejudiced in the presentation of his appeal. The case of Weisbecker v. Weisbecker, 71 Cal.App.2d 41, 161 P.2d 990, cited by appellant, presented an entirely different situation, in which no transcript at all was available.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

76 Cal.App.2d 828

ELLENBERGER v. CITY OF OAKLAND et al.

Civ. 12338.

District Court of Appeal, First District, Division 1, California.

Nov. 19, 1946.

Hearing Denied Jan. 16, 1947.

1. Appeal and error 🔑1217

Normally an appellate court loses jurisdiction of a cause when the remittitur has been filed in the court below.

2. Appeal and error 🔑1218

An appellate court has no appellate jurisdiction over its own judgments, and it cannot review or modify them after the cause has passed from its control by issuance of the remittitur, but, where judgment of appellate court has been secured by fraud or imposition practiced on it, such court may recall the remittitur.

3. Appeal and error 🔑1218

The power of an appellate court to recall a remittitur is only exercised where fraud or imposition in securing judgment appears clearly, and where claimed fraudulent acts, if proved, would have resulted in a different judgment.

4. Mandamus 🔑187(9)

In order for policeman's widow to prevail on appeal from judgment denying her petition to compel payment of pension, widow must show not only that she had introduced credible evidence on basic issues as to whether husband had sustained injury in course of employment and as to whether there was a causal connection between such injury and death, but also that there was no credible or substantial evidence opposed to her evidence that would support the findings adverse to her.

5. Appeal and error 🔑1218

Where question as to whether trial court properly refused plaintiff's motion for a continuance to secure attendance of necessary witness was fully passed upon on the appeal, and petitioner did not challenge the opinion affirming trial court's action by petition for rehearing or hearing, petitioner could not thereafter relitigate the matter on motion to recall remittitur.

6. Fraud 🔑41

Fraud must be specifically alleged.

7. Appeal and error 🔑1218

Petition to recall a remittitur affirming a judgment refusing to compel payment of pension to petitioner as policeman's widow, which alleged that original petition in trial court had been fraudulently altered without petitioner's knowledge and consent by removal of one of the paragraphs thereof, but which did not show record of proceedings in trial court on formal motion to strike such paragraph, was insufficient.

8. Coroners 🔑22
Evidence 🔑334(4)

Fact that paragraph, in petition of policeman's widow to compel payment of pension, which alleged that an autopsy and coroner's inquest had been held on her husband was stricken by trial judge after a formal motion to strike, did not preclude widow from introducing in evidence the death certificate of her husband or verdict of coroner's jury.

9. Appeal and error 🔑1218

Mere charge that certain evidence that was available and not introduced was "suppressed" by petitioner's counsel at trial was not sufficient to require appellate court to recall its remittitur affirming a judgment adverse to petitioner, where the allegedly "suppressed" evidence could not have effected the result.

10. Evidence ⚷48

A death certificate and a verdict of coroner's jury were both public records of which courts could take judicial notice.

11. Appeal and error ⚷1218

A motion to recall a remittitur may be granted in unusual cases, but the motion must be properly made, and that unexplained delay is itself sufficient to deny the relief.

12. Appeal and error ⚷1218

Where petition to recall a remittitur contained no explanation as to why petition for rehearing had not been filed, as to why petition for hearing in Supreme Court had not been filed, or why petitioner had waited nearly three years to request relief, or as to time or circumstances under which petitioner was supposed to have discovered alleged fraud forming basis of petition, petition was denied.

◆

Petition by Annie Ellenberger against the City of Oakland and others for a writ of mandate. A judgment for defendants was affirmed on plaintiff's appeal. On plaintiff's petition to recall the remittitur.

Petition denied.

Annie Ellenberger, of Hayward, for petitioner and appellant in pro. per.

F. B. Fernhoff, City Atty., and John W. Collier, Asst. City Atty., both of Oakland, for respondent.

PETERS, Presiding Justice.

Petitioner, Annie Ellenberger, has filed in this court in propria persona a document entitled "A motion to set aside the judgment on the grounds of error, fraud or mistake." In addition to requesting various types of relief which this court has no power to grant, the petitioner requests that a judgment affirmed by this court in June of 1943 (Ellenberger v. City of Oakland, 59 Cal.App.2d 337, 139 P.2d 67), and in which the remittitur was issued on August 25, 1943, be set aside and the issues therein decided be relitigated. Although the petition is quite inexpertly drawn, and is gravely deficient in its allegations, this court has determined to treat the petition as one to recall the remittitur.

[1-3] Normally, of course, an appellate court loses jurisdiction of a cause when the remittitur has been filed in the court below. An appellate court has no appellate jurisdiction over its own judgments, and it cannot review or modify them after the cause has passed from its control by the issuance of the remittitur. However, where the judgment of the appellate court has been secured by fraud or imposition practiced on it, such court may recall the remittitur. The theory upon which this is done is that an order secured by such fraud is a nullity, and that such an order does not deprive the court of jurisdiction. See Isenberg v. Sherman, 214 Cal. 722, 7 P.2d 1006; Talbot v. Fire, etc., Pension Bd., 51 Cal.App.2d 193, 124 P.2d 352; Haydel v. Morton, 28 Cal.App.2d 383, 82 P.2d 623; see discussion 2 Cal.Jur. p. 1068, § 634; 1 Cal.Jur.Supp. p. 662, § 634; 23 Cal.L.Rev. 354. But this power is only exercised where such fraud or imposition appears clearly, and where the claimed fraudulent acts, if proved, would have resulted in a different judgment. There must be an end to litigation, and that end normally occurs when the remittitur issues.

A reading of the present petition discloses that it falls far short of alleging facts showing either due diligence on the part of petitioner or a sound legal reason why the remittitur should be recalled. The petition is so gravely deficient that this court would have been warranted in denying from the bench the requested relief without an opinion, but, because petitioner is unrepresented by counsel, and out of an abundance of caution, and in order to ascertain whether there has been a miscarriage of justice, this court has examined the entire record of the original appeal as well as all documents and exhibits submitted in this proceeding. After such examination it is our opinion that petitioner has failed to present a case entitling her to the relief requested.

The petitioner charges various attorneys and public officials with committing acts which, even if true, have no relation to the case before us. This is a proceeding to recall the remittitur in the case of Ellenberger v. City of Oakland, 59 Cal. App.2d 337, 139 P.2d 67. Our power is to determine whether the judgment in that case was secured in this court as the result of fraud or imposition. This is not a court of original trial jurisdiction. We have no power in this proceeding to decide other controversies that may exist between petitioner and her attorneys, or the City of Oakland or its officials. Thus it is important to keep in mind just what was involved in the case of Ellenberger v. City of Oakland, supra.

Petitioner is the surviving wife of George Ellenberger who was a member of the Oakland Police Department and who died in 1939 of a stroke. The wife petitioned the Pension Board for a pension, it being her contention that her husband had been injured in the course of his employment in January, 1932, and that the 1939 death resulted from, or was contributed to, by the 1932 injury. The Board denied her a pension, whereupon she petitioned the Superior Court of Alameda County for a writ of mandate to compel the Board to issue her a pension. The trial court took evidence and denied the writ of mandate. Petitioner thereupon appealed to this court. This court unanimously affirmed the lower court. No petition for rehearing was filed herein, nor was a petition for hearing in the Supreme Court filed. The remittitur issued from this court August 25, 1943. No complaint of any kind was filed in this court until the present petition to recall that remittitur was filed on June 22, 1946.

[4] It is quite clear that before the Board and the trial court the petitioner, in order to prevail, had to prove several things by a preponderance of the evidence—first, that the fall of 1932 was caused by the employment, that is, that such fall caused a stroke, and that a stroke, non-industrial in nature, did not cause the fall; and secondly, that the 1939 stroke was contributed to by the 1932 fall. She offered but little evidence on these points and contrary evidence was introduced, both before the Board and the trial court. When the case was appealed to this court the burden of petitioner was much greater. In order to prevail here it was incumbent upon her to show not only that she had introduced credible evidence on the basic issues, but that there was no credible or substantial evidence opposed to her evidence that would support the findings adverse to her. In other words, it was incumbent upon her to show that the uncontradicted evidence demonstrated the receipt of an injury in the course of the employment, and a causal connection between such injury and death. Naughton v. Retirement Board of S. F., 43 Cal.App.2d 254, 110 P.2d 714; Brant v. Retirement Board of S. F., 57 Cal.App. 2d 721, 135 P.2d 396; Dornell v. Retirement Board, 72 Cal.App.2d 197, 164 P.2d 266. This court reviewed the record with these rules in mind. In so doing it not only considered all of the evidence, including all the exhibits admitted into evidence, but also considered a considerable number of exhibits that were offered by petitioner and at first excluded and then only inferentially admitted. This court found that while petitioner had demonstrated that her husband's health had declined in the period 1932–1939, she had failed to prove the other basic elements of her case. To say the least, the evidence as to whether the 1932 fall was industrial, and whether there was any causation between the 1932 fall and the 1939 stroke, was conflicting. There was ample, competent, credible and substantial evidence of qualified doctors that the 1932 fall had nothing to do with the 1939 stroke. That being so, this court could do nothing but affirm the judgment.

In the present proceeding the petitioner complains at length about her failure to receive industrial accident benefits, about the failure of the city officials to file a petition with the Industrial Accident Commission, about the lack of, or unscientific, care given her husband after his injury, about the failure of the City of Oakland to pay her husband's medical expenses from 1932 to 1939, of the failure of the city to pension her husband between 1932-1939, and the compelling him to work during that period, for performing an allegedly illegal autopsy on her husband's body, etc., etc. In connection with these matters she charges that all connected with them, including her attorney, the courts, and the public officials were guilty of fraud. These matters have no relevancy at all in the present proceeding. Even if there were irregularities or even fraud in connection with any of these matters (a point we, of course, do not decide) it could have no effect at all upon the present proceeding, all of such matters being completely outside the issues here involved.

Certain allegations in the petition do directly relate to the present proceeding. Thus it is averred that the original reporter's transcript filed in this court was not accurate and was changed in several places. The transcript is properly certified by the trial judge as being accurate and complete. The petition lists several of these alleged inaccuracies. Nowhere is it alleged, or could it be alleged, that even if such minor changes were made in the transcript that it would in any way have affected the disposition of the appeal. A reading of the entire record, including the matters alleged to have been omitted or changed, demonstrates that the charged irregularities were all inconsequential.

It is also urged that this court committed an "improvident error" in preparing the opinion. This contention is based on the following facts: On the appeal the appellant urged that the trial court had abused its discretion in refusing appellant a continuance. This court properly held that petitioner's showing on this point fell far short of demonstrating, as a matter of law, an abuse of discretion. In discussing the point this court stated (page 341 of 59 Cal.App.2d, page 69 of 139 P. 2d): "Counsel for petitioner did not state the name of the doctor they wished to call, nor the particular, or any, point petitioner hoped to prove." Petitioner contends that this is an erroneous statement of fact, and refers to the reporter's transcript pages 56-60. A reading of that portion of the record demonstrates that the statement in the opinion was substantially correct. At p. 58 of the transcript petitioner's then counsel spoke of wanting the reports of several doctors, but she did not state that she wanted the oral testimony of any of these doctors, with the exception of Dr. Hamlin. She did not state what she expected to prove by the reports or testimony. In her present petition she sets out several letters and medical reports from the doctors referred to, but none from Dr. Hamlin. Thus it does not appear what petitioner, during the trial or now, expected or expects to prove by the testimony or report of Dr. Hamlin. In her present petition it would appear that she is now contending that she wants the testimony of Doctors Steinmetz and Dougherty, who were her husband's personal physicians during 1932–1939. No such request was ever made by her counsel at the time the continuance was requested, and these doctors, although attending physicians, were not called by her.

[5] It should also be noted that on the appeal the continuance issue was fully argued, and that in her brief petitioner attempted to support her argument thereon as she does in the present proceeding by the portions of the record above noted. The point was fully discussed and passed upon. It cannot now be relitigated. Petitioner did not see fit to challenge the opinion by petition for rehearing or hearing. Those were her proper remedies.

[6-8] The balance of the petition in the present proceeding charges, in vague, general, uncertain and incomplete terms, that various frauds have been practiced upon her. The pleading is wholly insufficient. It is, of course, not sufficient to plead fraud in general terms—it must be specifically alleged. See cases collected 12 Cal.Jur. p. 800, et seq., § 62 et seq. From these vague and uncertain allegations it would appear that petitioner charges that her original petition in the trial court was fraudulently altered without her knowledge and consent by the re-

moval of Paragraph X thereof. That paragraph apparently referred to the fact that an autopsy and coroner's inquest had been held on her husband. This paragraph was stricken by the Presiding Judge after a formal motion to strike. The record of the proceedings on that motion is not before this court, but apparently the motion was granted because the allegations were evidentiary in character. Just how the striking of the allegation in question injured petitioner does not appear. Regardless of the order, the documents referred to in the stricken paragraph could have been offered in evidence at the trial. The record shows that no such offer was made.

[9, 10] Petitioner also contends that her attorney at the trial, acting in collusion with the city attorney's office, suppressed certain evidence. Other than the bare allegation no supporting facts are set forth. She merely charges that her attorney did not introduce the death certificate of her husband or the verdict of the coroner's jury. From the certified copy of the death certificate furnished this court on the present proceeding it appears that that document recites that death was caused by various types of heart disease, and by an accident occurring in August, 1932, in a public place when the decedent had slipped and fell and struck his head. The coroner's jury found the death to have been accidental. While these documents undoubtedly, if properly authenticated, would have been admissible, they, of course, would not have been conclusive. These reports could not possibly have proved that the January, 1932, fall was not the result of a stroke, which was one of the basic points involved. The various medical reports that were introduced demonstrated almost to a certainty that the decedent was suffering from a progressive heart disease and other complications, non-industrial in nature. The mere charge that certain evidence that was available and not introduced was "suppressed" by her counsel at the trial is not sufficient to require a court to recall its remittitur where the allegedly "suppressed" evidence could not have affected the result. Moreover, these documents were both public records of which the courts could take judicial notice. Just how these public records were "suppressed" or could be "suppressed" does not appear from the petition. It is quite significant that, although the record shows that petitioner was represented by several lawyers on her appeal (these lawyers being different from the lawyer who appeared at the trial), they made no charge of suppression on the appeal.

Very general and unsupported charges are made that the various doctors' reports which support the decision were false. These reports were offered in evidence by petitioner at the trial. Petitioner contends that these reports are contrary to certain letters and reports written by the same doctors, and which letters and reports she now offers in support of her contention. A reading of these documents demonstrates that they do not contain contradictory opinions. The record shows that these doctors attempted in every reasonable way to try to find that this man's illness was industrial. After careful and complete diagnosis they finally became convinced that it was not.

[11, 12] Another factor should be mentioned. While a remittitur will be recalled in certain unusual cases, it is a fundamental rule that the motion must be promptly made, and that unexplained delay is itself sufficient to deny the relief. Talbot v. Fire, etc., Pension Bd., 51 Cal.App.2d 193, 124 P.2d 352; Gutelius v. General Electric Co., 39 Cal.App.2d 292, 102 P.2d 1108. In the petition here under consideration there is no explanation at all as to why a petition for rehearing was not filed, as to why a petition for hearing in the Supreme Court was not filed, or why petitioner has waited nearly three years to request relief, or as to the time or circumstances under which she is supposed to have discovered the alleged fraud. This renders the petition fatally defective.

After considering the entire record here presented, we are convinced that this is simply a case in which the petitioner failed to prove her case before the Board or the trial court, where she lost her appeal, and where she now seeks to relitigate the issues decided against her in the belief that the original decision was wrong. A remittitur may not be recalled on such a ground.

The petition to recall the remittitur is denied.

WARD, J., and SCHOTTKY, Justice pro tem., concur.

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76 Cal.App.2d 793

SAYRE v. WESTERN BOWL et al.

Civ. 15235.

District Court of Appeal, Second District, Division 3, California.

Nov. 15, 1946.

Rehearing Denied Dec. 10, 1946.

Hearing Denied Jan. 14, 1947.

1. Master and servant 🔑83

The phrase "without abatement or reduction", as used in statute respecting penalty for nonpayment of wages means merely without discount on account of payment thereof before wages were payable according to contract of employment. Labor Code, § 203.

See Words and Phrases, Permanent Edition, for all other definitions of "Without Abatement or Reduction".

2. Master and servant 🔑83

Statute providing that if employer wilfully fails to pay, without abatement or deduction, any wages of an employee who is discharged or who quits, such wages shall be taken as a penalty for not more than 30 days was not violated by employers, where evidence revealed no attempt by employers to discount the amount properly due discharged employee. Labor Code, § 203.

3. Master and servant 🔑70(3)

Where manager, who was paid a monthly salary and also all monthly profits over a certain amount, was customarily paid his percentage of profits four to six weeks after end of the month, court, in determining when manager was entitled to receive his percentage of monthly profits, properly invoked practical construction rule.

4. Master and servant 🔑79

Where there was no dispute between manager and employers over manager's wages at time of manager's discharge, nor at time of tender to him of check representing his final share of profits, statute respecting payment of disputed wages was inapplicable. Labor Code, § 206.

5. Master and servant 🔑83

Where there was no dispute over wages between employers and manager after his discharge, employers were justified in asserting, as a condition of accounting between the parties pursuant to contractual arrangement, whereby manager was to receive profits over a certain amount, that payment of final amount found by them to be due manager should be based on a release by him of any further salary or bonus claims against employers, and therefore manager was not entitled to recover penalty under statutes. Labor Code, §§ 203, 206.

6. Master and servant 🔑83

Statute respecting penalty for nonpayment of wages may be invoked by a discharged employee only on proof that employers wilfully failed to pay wages due him in accordance with statute providing that if an employer discharges an employee, the wages earned and unpaid at time of discharge are due and payable immediately. Labor Code, §§ 201, 206.

7. Master and servant 🔑70(3)

Where manager, who was employed at a monthly salary plus monthly profits over a certain amount, was paid his monthly percentage of profits one month, after accounting in which an item of $100 was entered for repairs that were never made, manager, after his discharge, was entitled to be credited with the $100

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action for breach of contract and for an accounting by Romeo Sayre against Westrn Bowl, Morrie Epstein, and others. From a judgment for the plaintiff for an allegedly insufficient amount, the plaintiff appeals.

Judgment modified and, as modified, affirmed.

Harold D. Kraft, of Los Angeles, for appellant.

Don M. Kitzmiller, of Los Angeles, for respondents.

KINCAID, Justice, pro tem.

Plaintiff appeals from a judgment in his favor in the sum of $261.87, which he considers insufficient in amount. The cause came to issue on plaintiff's amended complaint setting forth causes of action for breach of contract and for accounting and defendants' answer thereto.

After trial by court and rendition of judgment, the trial judge made and filed his findings. The substance of the evidence, relied upon by defendants as supporting such findings, is as follows: Defendants were copartners operating a bowling alley, liquor and cafe business in the city of Los Angeles under the name of Western Bowl. Prior to August 1, 1943, and during the time that his brother was managing such cafe, the plaintiff had been employed by defendants in several capacities, including that of cook. On the date mentioned defendants employed plaintiff to manage defendants' cafe under an oral agreement whereby the gross receipts of the business were to be turned over to the defendants at the end of each day and the latter would pay all cost of operation, including the pay roll, plaintiff to receive a salary of $58 per week and meals. For depreciation, utilities and other general charges, defendants were to retain $135 per month from the net profits, which sum was later increased to $200 per month. Plaintiff, as a bonus over and above his salary, was to receive all net profits in excess of the $135 per month, later $200 per month, with the understanding that all the costs of the operation of said business, pay roll, food costs, salaries, replacements, repairs and any other expenses usually or necessarily incurred in connection with the operation of said premises, including a discount of 50% on the meals of certain employees, should be charged against the restaurant receipts before computing such net profits. It was further agreed that plaintiff should continue his employment so long as his services were performed in a manner satisfactory to the defendants and he thereupon posted a cash indemnity bond of $170 with them. Plaintiff continued his employment as manager of the restaurant to and including January 31, 1944, during all which period he was paid his weekly salary promptly on the day due. Some four to six weeks following the close of each current month defendants furnished plaintiff with a statement, seven of which are in evidence, showing the operations of the restaurant for the particular month, with all charges and credits, and the thus ascertained sum he was to receive by way of a bonus under the contract of employment. Plaintiff had previously seen monthly statements similar in character which had been handed to his brother during the time that he was managing the cafe and prior to plaintiff's employment in this capacity. Plaintiff never objected to any item covered by the seven monthly statements, which had included the repairs and replacements with which his account had been charged. until he was informed by defendants on January 21, 1944 that his employment was to terminate as of January 31, 1944. At the same time defendant Epstein presented to plaintiff the statement of operations for the month of December, 1943, which showed plaintiff to be entitled to the sum of $1,081.74 as his bonus for that month. Plaintiff then protested being charged with the entire amount of repairs and replacements for the cafe for the reason that, due to such termination of his employment, he would not receive the full benefit thereof. Epstein thereupon offered to credit plaintiff with the sum of $135, the cost of a recently installed toaster, which offer was accepted by plaintiff as being in full for such claim. The evidence reveals no further dispute between the parties as to what amount was still due plaintiff as of this date. His December bonus account was thereupon increased to $1,216.74, which sum was paid him.

On January 31, 1944, the $170 indemnity cash deposit was returned to plaintiff and, prior to a determination as to what his January bonus would amount to, he was given $500 on its account in January, and another $500 in February, 1944. In March, 1944, when the sum was ascertained by defendants as to which plaintiff was entitled for the balance of his bonus due him for his services rendered during the month of January, a check in that amount, being $261.87, was tendered plaintiff, together with the monthly statement, and he was asked to sign a release of all claims for wages and bonuses. This he refused to do. Defendants in their answer to plaintiff's amended complaint offer to pay this sum to plaintiff as the balance due him.

Plaintiff's primary point on this appeal is that the trial judge, under the evidence herein, erred in refusing to impose against defendants the penalty prescribed in section 203, Labor Code, for wilfully refusing to tender plaintiff his wages in the sum of $261.87 until March, 1944, although defendants now concede they owe him this amount for services performed in January, and for then refusing to pay such wages because of plaintiff's declination to execute a release of any further claims for his services.

The pertinent portions of section 203 read: "If an employer wilfully fails to pay, without abatement or reduction, in accordance with sections 201 and 202, any wages of an employee who is discharged or who quits, the wages of such employees shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than thirty days. No employee who * * * refuses to receive the payment when fully tendered to him, including any penalty then accrued under this section, shall be entitled to any benefit under this section for the time during which he so avoids payment."

Section 202, Labor Code, relates to a quitting employee, so is inapplicable here, but section 201 thereof is as follows: "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately."

Plaintiff also relies on section 206, Labor Code: "In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed."

[1, 2] It will be noted that section 203 concerns itself with "wages" to be paid "without abatement or reduction." The meaning of this latter term was before the court in the case of People v. Porter, 1930, 107 Cal.App.Supp. 782, 288 P. 22, wherein its use in the Act of 1919 (Stats. of 1919, p. 294), the predecessor of the Labor Code sections here in question was considered. We are in accord with the view there expressed that such term means merely "without discount on account of the payment thereof before the time they were payable according to the terms of the contract of employment." As the evidence reveals no attempt on the part of defendants to discount the amount properly due plaintiff it is clear that the provisions of section 203 relating to payment of wages without abatement or reduction have not been violated by them.

Plaintiff argues, however, that the sum of $261.87, denominated a "bonus" by the agreement of the parties, was in fact a part of his wages, was earned and unpaid at the time of his discharge and therefore was due and payable immediately. From this premise he contends that the subsequent delay on the part of defendants in ascertaining and tendering to plaintiff the balance of the net earnings of the business for January constituted a wilful failure to pay his then due wages immediately, so the additional sum of $1,000, his average 30-day period earnings, should be assessed in his favor as a penalty under section 203.

[3] The trial judge, in construing the terms of the contract between the parties and in applying the evidence thereto, was justified in invoking the well-settled rule that "a construction given the contract by

the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the court." Woodbine v. Van Horn, Cal.Sup. 1946, 173 P.2d 17, 22. The evidence as to such acts and conduct of the parties, prior to the date of the tender of the $261.87 check, discloses a clear understanding between them that plaintiff was to receive his set salary each week but that the additional sum to which he might be entitled, whether it may be called a bonus or wages, was payable from net profits only, on a monthly basis, after an accounting was had showing all applicable charges and credits, which accounting customarily required four to six weeks to complete. He was at all times paid his weekly salary when due, including the week to and including the day of his discharge. He accepted $500 twice on the so-called bonus account, without complaint or protest, during the succeeding interval. He offered no protest as to the amount finally tendered him in March but did refuse to sign a receipt in full for wages due him.

[4] Since there was no dispute between the parties over wages at the time of plaintiff's discharge nor at the time of the tender to him of the check representing his final share of the profits, section 206 is clearly inapplicable to plaintiff's case. As the sum ultimately found to be due plaintiff as a "bonus," under the construction placed upon the contract by the parties themselves, was not due and payable immediately upon the date of discharge but only some weeks later after an accounting was had between the parties as to the month's business done by the restaurant, the provisions of section 201 do not here apply.

[5, 6] Plaintiff further urges his right to the penalty sought under section 203 upon the basis that defendants refused to pay him the $261.87 because he would not execute a release of any and all other claims or demands that he might have against them for further salary or bonus. He claims this to be a "condition," within the purview of, and forbidden by, section 206. As previously shown, however, the latter section applies only where there is a dispute over wages and none was proved in this case even up to the date of final tender and refusal. Under the circumstances here existing the defendants were justified in asserting, as a condition of the accounting as between the parties pursuant to their contractual arrangement, that the payment of the final amount found by them to be due plaintiff should be based upon a release by him of any further salary or bonus claims against defendants. See Manford v. Menil Singh, 1919, 40 Cal.App. 700, 702, 181 P. 844; People v. Porter, supra, 107 Cal.App.Supp. 782, 784, 288 P. 22. Furthermore, section 203 may be invoked by plaintiff only upon proof that the defendant employers wilfully failed to pay wages due him in accordance with section 201, and such proof is utterly lacking. The penalty sum sought under section 203 was properly denied plaintiff by the court.

[7] Plaintiff directs our attention to an item of $100 which he claims should have been allowed him in addition to the sum represented by the judgment. In response to a question concerning it the defendant Epstein conceded that this sum represented a general entry on the accounts as an arbitrary reserve for contemplated repairs which had never been expended. He could not remember as to whether plaintiff had ever been told of this unused charge against his net profits share. The testimony of defendant Weiner substantiates these facts. As the monthly statements which were furnished plaintiff by defendants did not itemize the amounts making up the one charge entitled "repairs," he did not ascertain the fact that he had been so overcharged until a time subsequent to the accounting and tender of final check in March, 1944. Plaintiff then, under this undisputed evidence, is entitled to have the judgment in his favor increased by an additional $100.

We have examined and considered the other points made by plaintiff on this appeal and find them to be without merit.

The judgment is hereby modified by striking therefrom the words and figures "Two hundred sixty-one and 87/100 ($261.87)" and by substituting in their place the following: "Three hundred sixty-one and 87/100 ($361.87)." The trial court is hereby directed to amend the conclusions and judgment in accordance herewith. As so modified the judgment is hereby affirmed, appellant to be allowed his costs on appeal.

DESMOND, P. J., and WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.

PALMTAG v. DANIELSON.*

Civ. 13005.

District Court of Appeal, First District, Division 2, California.

Nov. 20, 1946.

As Modified on Denial of Rehearing Dec. 20, 1946.

Hearing Granted Jan. 16, 1947.

1. Brokers 🔑7

Written agreement between owner and broker governed the rights and duties of the parties and could be altered only by contract in writing or an executed oral agreement. Civ.Code, § 1698.

2. Brokers 🔑13

Where contract between owner and broker was in writing and broker did not inform owner that offer of prospective buyer would not meet the price desired by owner, a subsequent oral promise by owner to pay 5 per cent commission did not waive any existing restrictions on broker's authority as specified in written instrument. Civ.Code, § 1698.

3. Brokers 🔑57(2)

That written contract provided a sale price of $40,000 minus 5 per cent commission or $38,000 net to owner did not necessarily exclude broker's right to commission if owner concluded at a lower price a sale of which the broker was the procuring cause.

4. Brokers 🔑57(2)

The broker is not entitled to a commission on a transaction consummated by the principal at a lesser price than that stipulated to the broker if the broker's contract of employment expressly makes the payment of commissions dependent on the obtaining of a certain price for the property.

5. Brokers 🔑13, 57(1)

Where contract provided that price of property was $40,000 and that if broker arranged sale, client would pay 5 per cent commission, or a net to owner of $38,000 the broker was authorized to sell for only a net amount and any commission depended on client's getting a net of $38,000 for the property.

6. Brokers 🔑57(2)

Where broker's commission depended on client's getting $38,000 net for the property but purchaser would not pay anywhere near such amount and broker did not inform owner of such fact and owner concluded contract with purchaser for $35,000, broker was not entitled to a commission.

7. Brokers 🔑44

Where prospective purchaser would not pay net price on which broker's commission depended nor a price that was then satisfactory to owner, who notified broker of termination of contract and later sold at a much lower price to same prospective buyer who had been sent by broker, broker was not entitled to any commission.

8. Appeal and error 🔑171(3)

Where good faith of owner in cancelling broker's contract was not raised by the pleadings because of broker's incorrect allegation that sale on which right to commission was based took place on a date prior to revocation of contract by owner but question of good faith in cancellation of contract was fully tried out in trial court property owner, on appeal, could rely upon facts showing that cancellation was effective and that it was made in good faith.

9. Appeal and error 🔑171(3)

The general rule is that appellant cannot for the first time on appeal claim that a question was not raised by the pleadings when the trial court proceeded without objection on the theory that the question was at issue.

10. Appeal and error 🔑1071(6)

That trial court did not make a finding on owner's good faith in terminating broker's contract was immaterial where the evidence was before the court and would be insufficient to support a finding that termination was not in good faith.

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* Subsequent opinion 183 P.2d 265.

11. Brokers ⚿88(1)

Whether revocation of broker's contract is in good faith or for the purpose of defeating the broker's commission is ordinarily a question of fact but becomes a question of law when there is no evidence upon which a jury would be justified in finding bad faith or fraud on part of owner.

12. Brokers ⚿86(2)

In action by broker for commission, evidence showed that revocation of broker's contract before sale by owner to one originally referred to owner by broker was made in good faith.

13. Brokers ⚿84(1)

Broker suing for commission had burden of showing that he had a valid contract in force at the time sale was made.

14. Evidence ⚿60, 69
Fraud ⚿50

All the presumptions of law are against fraud and bad faith and in favor of fairness and regularity in private transactions. Code Civ.Proc. § 1963, subds. 1, 19.

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Appeal from Superior Court, Alameda County; A. J. Woolsey, Judge.

Action by Leo Palmtag against Carl E. Danielson to recover broker's commission. From a judgment for plaintiff for $1,750 the defendant appeals.

Judgment reversed.

Nathan Frankel and Sloss & Turner, of San Francisco, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff Leo Palmtag a duly licensed real estate broker was awarded a commission of $1,750 by the court sitting without a jury and defendant Carl E. Danielson appeals. The complaint is in two counts: The first is in indebitatus assumpsit in the sum of $1,750, which sum it is alleged defendant agreed in writing to pay for plaintiff's services; the second count pleads a special agreement in writing of the 29th of April, 1943, in which defendant employed plaintiff to procure a purchaser for defendant's property in Hayward, California, promising him to pay a commission of 5% of the selling price for his services for finding a purchaser, whereas the property was sold on the 4th of October, 1943, to a purchaser procured by the plaintiff in the month of May, 1943.

The answer denies the material allegations of the complaint. The evidence shows that in response to an inquiry by respondent, appellant on the 29th of April, 1943, wrote a letter to respondent of which the following parts are relevant:

"Yes, I am interested in selling my property in Hayward providing that I can get my price. * * * I have a price of $40,000.00 on the property and if you should arrange the sale, I will pay you 5% commission or a net to me of 38,000.00. * * * I am not overly anxious to sell the property, but, however, as above stated, I would consider a sale."

This letter together with the acknowledgement of it by respondent dated May 1, 1943, form the contract in writing between the parties. Respondent's acknowledgement contains the sentence, * * * "I do think there should be only one price on the property, regardless of whether you sell it or we, the price being $40,000."

In the month of May, 1943, respondent contacted different people, among whom was Elwood Johnson, a partner of the Arthur C. Day Implement Co. who until then did not know that the property was for sale. He had some conversations with respondent and received information from him but at that time was not interested in purchasing. In September, 1943, the tenancy of the premises then occupied by the Arthur C. Day Implement Co. was terminated and Elwood Johnson called on respondent to discuss buying the property. Respondent gave Johnson information and with him inspected the property and visited the local banker to discuss the advisability of the purchase. Elwood Johnson was then very much interested, mentioned a price of $35,000, but still did not make any definite offer. On or about the 4th day of October, 1943, Johnson made an appointment direct with appellant; he informed respondent of this fact and promised him to tell appellant that respondent had worked with him on the property. Respondent himself called appellant by telephone to tell him it was he who had spoken to Mr. Johnson about the property. Until this telephone call respondent had not communicated with appellant since the month of May, 1943. There is a sharp conflict in the evidence with respect to the further contents of this telephone conversation, respondent's version of it being that he told appellant that he felt that he had sold Johnson the property, to which appellant responded that if he sold the property to Mr. Johnson he would pay respondent a 5% commission. Respondent did not mention that Johnson had told him that he did not intend to pay more than $35,000.

In the direct conversation between Johnson and appellant the latter in answer to a question as to what he wanted for the property said: "he wanted $40,000; he was asking $40,000 and he would be willing to take $38,000 net to himself." When Johnson in response thereto mentioned a price of $35,000, appellant suggested the possibility of splitting the difference, subject to the consent of his wife, but Johnson did not commit himself. He said he did not think he would be interested at $36,500 and could not even conclude at $35,000 without consulting his partner. The conversation ended with the arrangement that appellant would consult his wife and Johnson his partner about the price, and that appellant was to contact Johnson again. Before appellant did so he sent a wire to respondent, saying that he had decided to sell the property direct that therefore there would be no commission to any broker.

Shortly after sending this telegram appellant communicated to Johnson his willingness to sell for $36,500, not for $35,000, and the negotiations continued—the parties stalling alternately—until on November 10 they concluded the sale for the price of $35,000. In the meantime appellant had tried to sell to others at a higher price and given a 10 days' exclusive agency to another broker at the price of $40,000 minus 5% commission, but no other broker had contacted Johnson with respect to the property.

The court found in substance in accordance with the complaint that by the writing dated April 29, 1943, defendant had agreed to pay a commission of 5% of the selling price to plaintiff for his services in procuring a purchaser for the property, that commencing in the month of May, 1943, plaintiff had rendered services in interesting Arthur C. Day Implement Co. in the purchase of the property, in negotiating with that company and in bringing it together with defendant and that said company had all the time been ready, able and willing to purchase that property for $35,000 and did purchase said property on or about the 10th of November, 1943, and that on that day the agreed commission of 5% of the selling price became due and payable by defendant to plaintiff.

Appellant contends that the court's finding as to the character of the agreement existing between the parties is not supported by the evidence and that the court failed to give due effect to the termination of the agency by appellant, before respondent had fulfilled his contract.

[1, 2] The relations of the parties is governed solely by their written agreement. Their telephone conversation in the beginning of October, 1943, cannot have altered it, as a contract in writing can only be altered by a contract in writing or by an executed oral agreement (sec. 1698, Civil Code); neither can appellant by promising 5% commission have waived any existing restrictions on respondent's authority as respondent did not tell appellant that Johnson's offer would not meet the price desired by appellant.

The terms of the letter of appellant as quoted above clearly show that respondent's authority was limited to the bringing about of a sale at the price of $40,000 minus 5% commission or $38,000 net to appellant.

[3] However, such limitation of the broker's authority does not necessarily exclude his right to a commission when the owner concludes at a lower price a sale of which the broker is the procuring cause.

"The rule is well established that if property is placed in the hands of a real-estate broker for sale at a certain price or upon certain terms, and a sale is brought about through the broker as a procuring cause, he is entitled to commissions on the sale even though the final negotiations are conducted through the owner, who in order to make a sale accepts a price less than that stipulated to the broker or terms more liberal than those the latter was authorized to accept. This rule applies where the broker sends his customer direct to the owner who carries on the negotiations himself." 8 Am.Jur. 1101–1102, Brokers, sec. 190; to the same effect 12 C.J.S., Brokers, § 86, subsec. b, p. 196; 43 A.L.R. 1104.

[4] An exception to this rule is generally recognized: The broker is not entitled to a commission on a transaction consummated by the principal at a lesser price than that stipulated to the broker, if the broker's contract of employment expressly makes the payment of commissions dependent on the obtaining of a certain price for the property. 8 Am.Jur. 1102; 12 C.J.S., Brokers, § 86, p. 197; 43 A.L.R. 1111; Restatement of the Law of Agency, sec. 447, page 1048. A special aspect of this exception is, that if the broker is to have as commissions only what is received by the principal above a specified net price and the principal closes with the broker's customer for a sum not in excess of such stated net price the broker is entitled to no commission. Restatement of the Law of Agency, sec. 447, comment b, page 1049; 12 C.J.S., Brokers, § 78, p. 172.

The cases in our jurisdiction follow both the general rule (United States Farm Land Co. v. Darter, 42 Cal.App. 292, 303, 183 P. 696; Twogood v. Monnette, 191 Cal. 103, 108, 215 P. 542; Roth v. Thomson, 40 Cal.App. 208, 180 P. 656) and the exceptions Backman v. Guadalupe Realty Co., 78 Cal.App. 347, 248 P. 296.

In the more recent case of Haigler v. Donnelly, 18 Cal.2d 674, 679, 117 P.2d 331, 334, our supreme court adheres to the rules mentioned above. It states the rule applicable to a broker who undertakes to sell property under an agreement whereby he is to receive as commission a certain percentage of the sale price obtained as follows: "In such a case a seller cannot defeat the right of a broker to his commission by consummating a sale with the purchaser at a smaller price than that originally proposed. Boland v. Ashurst Oil, etc. Co., 145 Cal. 405, 78 P. 871; Wetzell v. Wagoner, 41 Mo. App. 509; cases cited in 9 C.J. 600, 601." As to the exception it states: "These cases also recognize, however, that the broker is not entitled to any recovery if his right to a commission is conditional on a sale at the price mentioned in his authorization (see cases cited in 9 C.J. 602; 12 C.J.S. Brokers, § 86). A broker under a net contract is entitled to no compensation unless he successfully negotiates a sale for more than the net amount."

[5, 6] The only reasonable interpretation of the contract involved here is that it was an authorization to sell for a net amount. The words "I have a price of $40,000" merely fixed an asking price. The words "I will pay you 5% commission" merely stated the usual commission payable for such sales. But the words "net to me of $38,000" plainly and clearly specify that whatever sale the broker "should arrange" his commission would be dependent upon a net of $38,000 to the seller. That the broker so interpreted the contract is shown by his letter of acceptance of May 1, 1943, stating: "* * * I do think there should be only one price on the property, regardless of whether you sell it or we, the price being $40,000." Having accepted the contract with these terms the broker knew that he must produce a buyer ready to pay more than $38,000 before he would be entitled to any commission. That he did not do so is conceded. He sent to the owner a prospective customer whom he knew would not pay any amount near that sum. He did not inform his principal that he knew the prospective customer would not be willing to purchase under the terms of the contract and did nothing further to bring about a sale.

For these reasons we are satisfied that our case is controlled by Haigler v. Donnelly, supra, and that respondent is not entitled to recover.

[7] But the judgment must be reversed for another reason which is equally controlling—the broker's contract was terminated before any sale was made. At the time of the revocation telegram, respondent had not earned his commission. The prospective purchaser procured by him was not willing to pay the price stipulated in respondent's authority, no sale at a lesser price had been concluded, and the prospective buyer was not even willing to pay a price which at that time was satisfactory to the appellant. Hence appellant argues that independent of the question of the interpretation of the contract, the respondent is not entitled to any commission unless he has proved that the revocation was not in good faith but was made to defeat his rights. "The contract not specifying its duration, either party was at liberty to terminate it at will, subject only to the ordinary requirements of good faith. * * *. It was essential to plaintiff's success, under his contract and his right to any commission thereunder, that he should furnish, during the life of the contract, a customer ready, able, and willing to take defendant's property upon terms satisfactory to the latter." Ernst v. Ganahl, 166 Cal. 493, 499, 137 P. 256, 259.

"Subject to the requirement of good faith, the principal, by revoking an ordinary contract of employment and giving notice thereof, may prevent the broker from recovering commissions not previously earned, but not commissions already earned." 12 C.J.S., Brokers, § 66, p. 150. "The rule is that the revocation must be made in good faith and not for the purpose of defeating the agent's rights * * *." Elms v. Merryman Fruit etc. Co., 207 Cal. 747, 751, 279 P. 781, 783.

Appellant contends that the question whether the termination was in good faith cannot be considered on appeal as it was not involved in the pleadings on the trial of the action and the trial court did not make any findings about it.

It is true that the issue was not involved in the pleadings and could not be involved as the complaint, which was not amended, incorrectly alleged that the sale and conveyance on which the right to commission was based took place on or about the fourth day of October, 1943, a date prior to the revocation of October 9.

[8] However, in the opening statement in behalf of plaintiff his attorney declared: "Now, we contend that, under the law, we are entitled to a commission, particularly since we expect that either the direct evidence in this case, or every reasonable inference to be drawn from it, will incline this Court to the view that the cancelation, or the attempted cancelation, by Danielson, of my client's brokerage, or his agency to handle that property, was prompted by a fraudulent motive on the part of Mr. Danielson, namely, to take advantage of my client's services and avoid payment of the brokerage commission." Appellant, Carl E. Danielson, called by plaintiff under section 2055 of the Code of Civil Procedure, was questioned at length by plaintiff's attorney with respect to his motives in terminating the agency at that particular time. No objection was made by defendant's attorney and he himself later questioned his client with respect to the reason for the termination and related facts giving as the reason, "Your Honor, the good faith of the defendant has been called into question here."

"It has been frequently held that, where a cause is tried upon the theory that certain facts are in issue, after judgment the cause will be considered as though such issues were correctly tendered by the pleadings." Starkweather v. Eddy, 87 Cal.App. 92, 98, 261 P. 763, 765. In that case the issue not sufficiently presented by the complaint was one of fraud.

In Wagner v. McManus, 2 Cal.App.2d 544, 38 P.2d 204, this court refused to entertain objections to the form of pleading of fraud where evidence of fraud and misrepresentations was not objected to by appellant and the cause was tried on the theory that the issue was properly before the court.

[9] In the case at bar the issue tried without sufficient pleading is not even that of actual fraud but only of good faith in terminating an agency. The general rule that appellant cannot for the first time on appeal claim that a question was not raised by the pleadings, when the trial proceeded without objection on the theory that that question was at issue, is too well known to require citation of authority.

[10] The fact that the trial court did not make any express finding as to the question of appellant's good faith in terminating the agency is immaterial, as the evidence is before this court and we conclude that as a matter of law it would be insufficient to support a finding that the termination was not in good faith but for the purpose only of defeating respondent's rights.

[11] Although as a rule the question as to whether the revocation was in good faith or for the purpose of defeating the agent's commission is a matter of fact it becomes a matter of law for the court when there is no evidence in the record upon which a jury would be justified in finding bad faith or fraud on the part of the principal in revoking the authority of the broker. Elms v. Merryman Fruit, etc., Co., supra.

The only circumstance, shown by the evidence, which could at all be argued as an indication of bad faith is that appellant terminated the agency at a time at which he was negotiating with Mr. Johnson, who had been interested in the property by respondent, and to whom he sold the property a month later at a price Mr. Johnson had from the beginning been willing to pay. But such an inference is negatived by the fact that at the time of the revocation there was not the least indication that the negotiations would lead to a sale or what time and efforts they still might require. Appellant had desired a price of $40,000 gross or $38,000 net to him, and was pondering to offer to sell at $36,500. Mr. Johnson had not mentioned more than $35,000 and had declared that he did not think he would be interested at a price of $36,500. Appellant at the time was so little inclined to accept a bid of $35,000 that during a month after the revocation he endeavored to sell at a higher price to third parties and gave a 10 days' exclusive agency at the price of $40,000 less 5% commission to another broker who thought he could sell it at that price.

[12] There is nothing in the evidence that negatives appellant's explanation of the revocation, that he had not heard from respondent from the month of May to the day he telephoned after Mr. Johnson had made an appointment and that he had never sent him anybody else who was interested in the property. These circumstances combined with the fact that the bid of the only prospect interested by respondent remained far below the price desired by appellant could very well lead appellant in good faith to the conclusion that it was more to his interest to try to sell himself or to take another broker than to continue respondent's agency.

Respondent relies for the contention of bad faith also on the fact that appellant early in his conversation with Johnson declared himself willing to accept a price of $38,000 which, if respondent, in accordance with appellant's view, were only entitled to a commission out of the excess over $38,000, would have deprived respondent of any and all remuneration. Although this may show little concern for the broker's interest it has no relation whatever to the facts which respondent had to prove, to wit, that the revocation, which took place some days later, was done in bad faith and for the purpose of depriving respondent of his commission. If appellant's theory as to the contract had been correct, and he had good reason to believe it was correct, respondent would not have been entitled to any commission even if no revocation had taken place.

[13, 14] The burden of proof was on the respondent to show that he had a valid contract in force at the time the sale was made. He pleaded the letter of April 29, 1943. The appellant pleaded the revocation of October 8, 1943, following his discovery of appellant's failure to disclose to him that Johnson would not pay more than $35,000. The right of appellant to revoke the agency is not denied—except that respondent says it must be done in good faith. This becomes the controlling issue on this phase

of the appeal. If appellant revoked in good faith respondent cannot recover on the contract. Here the burden of proof of bad faith was on the appellant who asserted it. Everett v. Standard Acc. Ins. Co., 45 Cal.App. 332, 187 P. 996; Estate of Ross, 199 Cal. 641, 250 P. 676, citing 12 Cal.Jur. 817. All the presumptions of law are against fraud and bad faith and in favor of fairness and regularity in private transactions. Code of Civil Procedure, sec. 1963, subds. 1, 19; Truett v. Onderdonk, 120 Cal. 581, 588, 53 P. 26. No facts were proved from which an inference of bad faith could be reasonably drawn. The trial court did not make any finding on the issue of bad faith, whereas, on all the evidence a finding should have been made that the termination was made in good faith before the sale was made. For these reasons we conclude that the evidence was insufficient as a matter of law; the termination was rightful, and respondent is not entitled to recover.

Judgment reversed.

GOODELL and DOOLING, JJ., concur.

In re TRAUNG'S ESTATE.

TRAUNG v. TRAUNG et al. *

Civ. 13001.

District Court of Appeal, First District, Division 2, California.

Nov. 19, 1946.

Hearing Granted Jan. 16, 1947.

1. Wills 🔑684(7)

The date of testator's death is the date of the commencement of the testamentary trust as respects right of life tenant to income.

2. Wills 🔑684(3)

Under the "Pennsylvania rule," where corporate stock forms a part of the trust estate, the income of which is to be paid to one for life with the remainder to another, the remainderman is entitled to the value of the stock as of the date of the creation of the trust, which is the date of testator's death, and any accumulations beyond that date are distributable as profits.

See **Words and Phrases, Permanent Edition**, for all other definitions of "Pennsylvania Rule".

3. Trusts 🔑272(3)

The Pennsylvania rule relating to the allocation between life tenants and remaindermen of the fruits of corporate investments is limited to cases of extraordinary dividends or profits, no attempt being made to apportion regular or ordinary dividends.

4. Trusts 🔑272(3)

In the case of extraordinary dividends, whether in cash or stock, the courts following the Pennsylvania rule apportion the earnings between life tenant and remaindermen by allocating to the corpus that portion of the extraordinary dividend earned before the creation of the trust and that portion earned after the creation of the trust is paid to the life tenant.

5. Wills 🔑684(3)

Generally, upon a liquidation of a portion of the assets of a testamentary trust the courts apportion to the life tenant the portion of the receipts of the liquidation which are attributable to earnings during the trust's existence.

6. Trusts 🔑272(3)

The essence of the Pennsylvania rule, relating to allocation between life tenants and remaindermen of the fruits of corporate investments, is that substance is not to be sacrificed to form, that the corpus of the trust estate is to be preserved intact for remaindermen, and the earnings in whatever manner received by the trustee are to go to the life tenants.

7. Wills 🔑684(3)

Where trust property consisted of stock of a corporation, the only asset of which was stock of a second corporation, and parties desiring to purchase second corporation did so by purchasing all the stock of first corporation, the price being based on net value of the assets of second corporation, which assets were enhanced in value by second corporation's earnings and those earnings in turn enchanced the value of first corporation's stock, the proportion of the sale price attributable to such earnings since testator's death should be allocated to life tenant as income. Civ. Code, § 3528.

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* Subsequent opinion 185 P.2d 801.

8. Estoppel ⊂⊃70(2)
Trusts ⊂⊃272(3)

Where all the assets of a trust consisting of corporate stock are sold and the purchase price is paid in installments, the first payments should go to preserve the corpus until its intact value is completely conserved and the failure to object to an earlier installment being credited to corpus should not estop the life tenant from asserting that a later installment should be paid wholly, or in part, to the life tenant.

9. Judgment ⊂⊃603

Where trust assets consisting of corporation stock are sold and the purchase price is paid in installments, the determination that one payment made to the trustee should be applied to corpus should not be considered res judicata of the proper application of a subsequent payment unless the question controlling the application of the later payment was actually presented to the court and adjudicated.

10. Wills ⊂⊃684(3)

Where testator indicated in only two specified particulars any intention to modify the general direction for the payment of net income and profit of the trust estate to the life tenant, under the rule of expressio unius exclusio alterius no other modifications of the direction to pay net income could be added to those expressed.

11. Trial ⊂⊃139(1), 142

The weighing of the evidence and the conclusions to be drawn therefrom are peculiarly for the trial court.

12. Trusts ⊂⊃274(1)

The loss from the sale of capital assets consisting of income bearing property fell upon corpus of trust and could not be charged to life tenant.

13. Wills ⊂⊃684(5)

Where the property of a testamentary trust consisted of corporation stock, any capital deficit of the corporation created before the inception of the trust could not be charged against earnings which were accumulated during the life of the trust and to which the life tenant was entitled.

14. Trusts ⊂⊃272(3), 280

The probate court could properly delay the distribution of income from trust property consisting of corporation stock until it could be ascertained whether income would be needed to meet contingent liabilities of the corporation, but the court could not allocate income to the corpus on such ground.

* * *

Appeal from Superior Court, San Francisco County; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Charles F. Traung, deceased. From an order approving the third account of Louis Traung and another as testamentary trustees, Mae Percival Traung, the widow and life tenant, appeals.

Order reversed.

Hugh K. McKevitt and Jack M. Howard, both of San Francisco, for appellant.

Philip S. Ehrlich, Albert A. Axelrod and R. J. Hecht, all of San Francisco, for respondents.

DOOLING, Justice.

This is an appeal by Mae Percival Traung from an order of the probate court approving the third account of respondents as testamentary trustees under the will of Charles F. Traung, deceased. Appellant is the widow of Charles F. Traung, deceased, and is the life tenant entitled to the income from certain property left by his will to the trustees, respondents herein. A part of the property so left in trust was 45,324 shares of Traung Investment Company, which represented approximately 20.16% of the outstanding stock of that company. At the time of the death of the testator Traung Investment Company owned 94% of the capital stock of Mt. Tivy Winery, Inc., and this stock was its only asset.

[1] Charles F. Traung died on February 6, 1940 and this date is the date of the commencement of the trust. Estate of Pratt, 21 Cal.2d 343, 131 P.2d 825. As of

December 28, 1942 all of the stockholders of Traung Investment Company sold all of their stock to Joseph E. Seagram and Sons, Inc., and Carstairs Bros. Distilling Co., Inc. This sale was expressly conditioned upon the sale including all of the issued and outstanding stock of Traung Investment Company and the total purchase price was based upon the difference between the value of the assets and liabilities of Mt. Tivy Winery, Inc., as shown by a balance sheet appended to the agreement of sale.

The second account of respondent trustees showed the receipt by the trustees on account of this sale of $74,440.28. All of this was allotted to the corpus of the trust and the account so allotting it was settled without objection.

The third account showed the receipt by the trustees of $17,750.51 on account of said sale. This amount was allotted to the corpus of the trust in the third account and appellant objected to the settlement of the account on the ground that this sum represented earnings which had accrued after the death of the trustor and should have been allocated to income.

While there is some dispute as to the proper construction and effect of the evidence (a matter which we will examine later) it is appellant's position that Mt. Tivy Winery, Inc., earned very substantial income between the date of the trustor's death and the date of the sale of the Traung Investment Company's stock, that this income enhanced the value of the assets of the corporation upon which the sale price was calculated, and that the proportion of the sale price attributable to these earnings was in law income from the corpus of the trust estate which should be paid to the appealing life tenant.

[2] Without elaborating upon the three rules current in the several courts of the United States with regard to the allocation between life tenants and remaindermen of the fruits of corporate investments, and which are known respectively as the Massachusetts, Kentucky and Pennsylvania rules, we are content to note that the Supreme Court of this state is committed to the so-called Pennsylvania rule. Estate of Duffill, 180 Cal. 748, 183 P. 337; Estate of Gartenlaub, 185 Cal. 375, 197 P. 90, 24 A.L.R. 1. That rule is summarized in Estate of Gartenlaub, 185 Cal. at pages 383, 384, 197 P. at page 93: "The doctrine generally adopted by the courts of America, and recognized by this court in Estate of Duffill, 180 Cal. 748, 183 P. 337, is that, where corporate stock forms a part of a trust estate, the income of which is to be paid to one for life with remainder to another, what the remainderman is entitled to is the value of the stock as of the date of the creation of the trust—that is, the testator's death. Any accumulations beyond that date are distributable as profits."

[3, 4] This rule, in the jurisdictions where it prevails, is limited to the case of extraordinary dividends or profits, no attempt being made to apportion regular or ordinary dividends. 2 Scott on Trusts, sec. 236.1, p. 1293 et seq.; 4 Bogert, Trusts and Trustees, § 844, p. 2445 et seq.; note in 130 A.L.R. p. 494 et seq. It finds its most frequent application in the case of extraordinary dividends, whether in cash or stock, in which cases the courts following the Pennsylvania rule apportion the earnings between life tenant and remainderman so as to preserve the intact value of the stock at the date of the creation of the trust to the corpus of the estate (i. e. that portion of the extraordinary dividend earned before the creation of the trust is allocated to the corpus of the trust and that portion earned after the creation of the trust is paid to the life-tenant). Estate of Duffill, supra, 180 Cal. pages 756, 757, 183 P. 337; Estate of Gartenlaub, supra, 185 Cal. pages 383, 384, 197 P. 90, 24 A.L.R. 1; 2 Scott on Trusts, sec. 236.3, p. 1300; 4 Bogert, Trusts and Trustees, sec. 843, p. 2443, sec. 848, p. 2456; note in 130 A.L.R. p. 538 et seq. The distinguishing feature of the Pennsylvania rule lies in the fact that the courts following that rule attempt to do exact justice between the life tenant and remainderman (in every case except that of regular or ordinary dividends where the amount involved is deemed too unimportant to justify the burden which would be imposed upon the court by attempting an allocation) by preserving the intact value of the corpus of the trust for the

remainderman and distributing all income actually earned after the creation of the trust to the life tenant. On the other hand the Massachusetts and Kentucky rules attempt no apportionment of earnings but adopt mechanistic rules of thumb, the only justification for which is found in simplicity of administration by trustees and a lightening of the burden of the courts which are not called upon under either of those rules to inquire into the source of the dividend or to ascertain the intact value of the corpus of the trust at the date of its creation. Cf. 4 Bogert, Trusts and Trustees, § 857, p. 2483 et seq. Since our Supreme Court is committed to the Pennsylvania rule no purpose can be served by examining further into the relative merits of the conflicting rules.

Accepting, as we must, the Pennsylvania rule as governing the decision of this case the primary question presented to us for decision may be simply stated: Where all of the stockholders in a corporation join in a sale of all of its capital stock, the aggregate purchase price being determined by subtracting its total liabilities from the total value of its assets, is the life tenant entitled to the proportion of the purchase price so arrived at which is attributable to earnings realized by the corporation since the creation of the trust? (In so stating the question we ignore for the moment the separate corporate identities of Traung Investment Company and Mt. Tivy Winery.)

[5] Generally in jurisdictions which follow the Pennsylvania rule upon such a liquidation of a portion of the assets of the trust the courts have apportioned to the life tenant the portion of the receipts of the liquidation which are attributable to earnings during the trust's existence. In re McKeown's Estate, 263 Pa. 78, 106 A. 189; United States Trust Co. v. Heye, 224 N.Y. 242, 120 N.E. 645; In re Sherman Trust, 190 Iowa 1385, 179 N.W. 109; In re Heaton's Estate, 89 Vt. 550, 96 A. 21, L.R.A.1916D, 201; Simpson v. Millsaps, 80 Miss. 239, 31 So. 912; Wallace v. Wallace, 90 S.C. 61, 72 S.E. 553.

In United States Trust Co. v. Heye, supra, the New York Court of Appeals said, 224 N.Y. 242, 120 N.E. 645, 648: "The fundamental principle involved in these questions is whether there has been a distribution or division of the earnings, profits, or accumulations of the corporation. Until there has been such division, the life tenant is not entitled to any increase in the value of the principal of the trust fund, or the capital and assets of the corporation, shares of which constitute the trust fund. But when there has been a division of the corporate property, no matter what form it may take, that part thereof which consists of accumulated profits or earnings belongs to the life tenant and that which is capital to the remainderman."

The case most nearly in point, and a leading authority in jurisdictions following the Pennsylvania rule, is In re McKeown's Estate, supra. There, as in our case, there was a sale of stock by the trustees in conjunction with all other understanding shares of stock to a single purchaser. The court held that the portion of the sale price attributable to earnings since the creation of the trust should go to the life tenant. The conclusion of the court is found in 106 A. at page 192: "When a corporation is liquidated, those entitled to the income of the trust are to be awarded so much of the sums received for the stock as they show was income accruing after their right to income began, and the balance goes to the principal; and this is so although the course pursued takes the form of a sale of the stock."

[6] We are satisfied that where the Pennsylvania rule is followed these cases reach the correct result. It is the essence of the Pennsylvania rule that substance is not to be sacrificed to form; that the corpus of the trust estate is to be preserved intact for remaindermen and the earnings in whatever manner received by the trustee are to go to the life tenants.

[7] The purpose of the sale here involved might have been equally accomplished by first distributing the earnings accumulated since the creation of the trust by way of dividend and then selling the stock of Traung Investment Company to the purchasers. In that case the dividend on the shares of stock held in trust would

clearly go to the life tenant and only the purchase price, reduced pro tanto by the dividend, would go to the corpus. The accident of procedure by which the sale was effected should not be allowed to change the result.

The fact that there were two corporations here involved is not important. Traung Investment Company owned and controlled Mt. Tivy Winery, Inc., and the shares which it held in Mt. Tivy Winery constituted its only asset. Earnings of Mt. Tivy Winery were in essence earnings of Traung Investment Company and under the circumstances the court should regard substance rather than form and disregard the separate corporate entities. Stark v. Coker, 20 Cal.2d 839, 846, 129 P.2d 390; Conway v. Citrus Belt Land Co., 94 Cal. App. 533, 538, 271 P. 525; Civ.Code sec. 3528. The very manner of the sale demonstrates how artificial is respondents' argument based on the separate corporate entities. The purchasers desiring to acquire the assets of Mt. Tivy Winery, Inc., did so by purchasing the stock of the Traung Investment Company. The purchase price of the stock of Traung Investment Company was expressly based on the net value of the assets of Mt. Tivy Winery. Those assets were enchanced in value by Mt. Tivy Winery's earnings and those earnings in turn enchanced the value of Traung Investment Company's stock. Our courts will not close their eyes to the realities of a situation simply because they are clothed in the legal trappings of one or a series of corporate forms. Corporations are made to serve men, not men to serve corporations, and in no case should courts allow corporate forms to overshadow the realities of the human beings who have created them. If the trustees had owned and operated the Mt. Tivy Winery properties without the interposition of two corporate entities the rights of appellant to the earnings of those properties which accrued after the creation of the trust would be obvious. The corporate shadows are not so opaque as to conceal from the court the intrinsic facts which underlie them.

[8, 9] It is argued also that the settling of the second account of the trustees, in which the total instalment receipts from the sale of the Traung Investment Company were allocated to the corpus of the trust, is res judicata of the question here presented. It is the theory of the Pennsylvania rule that the corpus of the trust should first be preserved intact before any earnings are paid to the remainderman. Where the purchase price is paid in instalments, as here, the first payments under this rule should go to preserve the corpus until its intact value is completely conserved and the failure to object to an earlier instalment being credited to corpus should not estop the life tenant from asserting that a later instalment should be paid wholly, or in part, to the life tenant. In any event the determination of the application of one payment should not be considered res judicata of the proper application of another unless the question controlling the application of the later payment has been actually presented to the court and adjudicated in connection with the earlier one. Estate of Blake, 157 Cal. 448, 456, 108 P. 287; English v. English, 9 Cal.2d 358, 70 P.2d 625, 128 A.L.R. 467.

We find no substance in the point that under the express provisions of the will and the decree of distribution following it the payment of earnings received in this manner to the life tenant is forbidden. Respondents rely on the following language of the will and the decree: "(1) My trustee or trustees shall apply the entire net income of all securities held by it hereunder to the use of the beneficiaries hereof, irrespective of the price paid for said securities, or irrespective of their market value at any time, it being intended hereby that no part of such income shall be applied as a sinking fund or otherwise to offset the gradual loss of premium upon the market value or purchase price of such securities. (2) All stock dividends and amounts received upon the sale of rights to subscribe for stocks or any profits accruing from the exercise of such rights, shall be credited to principal and added to the trust estate and be held as a part thereof."

[10] Neither of the quoted provisions applies to the situation here presented. The decree provides that the "trustees

shall pay the net income, revenue and profit of the trust estate to Mae Percival Traung, wife of Charles F. Traung, deceased, so long as she shall live * * *" in which respect it follows a like provision of the will. The testator indicated in the two particulars specified, and only in those particulars, an intention to modify the general direction for the payment of "the net income, revenue and profit of the trust estate" to the life tenant. Under the familiar rule of expressio unius exclusio alterius no other modifications of the direction to pay *net* income can be added to those which the testator saw fit expressly to provide.

[11, 12] This brings us to a consideration of the evidence produced before the probate court. The weighing of the evidence and the conclusions to be drawn therefrom, are peculiarly for the trial court and we shall pursue our inquiry no further than to determine whether the evidence showed substantial earnings during the trust period which were reflected in the purchase price. The evidence shows a net profit of Mt. Tivy Winery for the fiscal year ending July 31, 1942 of $45,201.22 after payment of income taxes and a net profit from August 1, 1942 to December 28, 1942, of $29,160.39 after payment of income taxes, or a total for the period August 1, 1941 to the date of the sale of $74,361.61. It further shows an operating profit from August 1, 1940 to July 31, 1941 of $28,448 and a loss from the sale of capital assets of $37,999, making a net loss in total assets for the year of $9,551. The loss from the sale of capital assets falls upon the corpus of the trust. "The fluctuations in market value after purchase by the trustee are merely changes in the value of the assets of the trust estate, which are to be wholly disregarded in any accounting between life tenant and remainderman for funds from the trust estate invested in income-bearing property." Estate of Gartenlaub, 185 Cal. 648, 652, 198 P. 209, 210, 169 A.L.R. 520; Estate of Gartenlaub, 198 Cal. 204, 215, 244 P. 348, 48 A.L.R. 677; Restatement Trusts, sec. 233 and comment b. The property involved in the sale was income bearing property, vineyard and ranch lands, and the loss entailed was a capital loss and not an operating one.

[13] Respondents attempt to reduce these earnings to the vanishing point by reference to various matters appearing in the testimony. They call attention to evidence that Traung Investment Company just prior to the sale had a capital deficit of $113,000. How or when this deficit was created does not appear, but it does appear clearly that during the entire life of the trust Traung Investment Company engaged in no business and had no assets except the shares of stock of Mt. Tivy Winery, Inc. It seems clear that this deficit must have been created before the inception of the trust and cannot be charged against the earnings which were accumulated during the trust's life. The other matters, adjustment and allocation of income taxes, claimed redemption of preferred shares and dividends paid to preferred stockholders, even on respondents' calculations are not sufficient to wipe out the earnings. We express no opinion on the amount, if any, of the deductions from gross income which the probate court should make on their account. Those are questions in the first instance for the probate court and may be more fully established, explained or refuted on a further hearing.

[14] Finally respondents call attention to the fact that there are contingent liabilities of Mt. Tivy Winery approximating $24,500 which may have to be met. The probate court may properly delay the distribution of income until it is ascertained whether it will be needed to meet contingent liabilities. It cannot allocate income to corpus on any such ground.

The order appealed from is reversed.

NOURSE, P. J., and GOODELL, J., concur.

76 Cal.App.2d 844

NEWBOLD v. SOCIAL WELFARE BOARD et al.

Civ. 3425.

District Court of Appeal, Fourth District, California.

Nov. 20, 1946.

Rehearing Denied Dec. 17, 1946.

Hearing Denied Jan. 16, 1947.

1. Paupers ⚷43(2)

The statute providing that blind aid shall not be received by person owning personalty in excess of $3,000 fixes a maximum amount of $3,000 which the Social Welfare Board may, in its discretion, allow blind person to have and still receive aid, but does not fix an amount which board must allow blind person to retain and still receive aid, regardless of other considerations. Welfare and Institutions Code, § 3047.

2. Statutes ⚷231

The statute providing that blind aid shall not be received by person owning personalty in excess of $3,000 must be interpreted in connection with and as a part of other provisions of the legislation providing for aid to the needy blind. Welfare and Institutions Code, §§ 3000 et seq., 3047.

3. Paupers ⚷2

The legislation providing for aid to needy blind was adopted for the purpose of operating in connection with the federal system of such aid, and with a view to obtaining federal assistance in providing such aid. Welfare and Institutions Code, § 3000 et seq.; Social Security Act, § 1002, 42 U.S.C.A. § 1202.

4. Paupers ⚷43(2)

A blind person is not a "needy blind person" entitled to aid merely because his income is insufficient to support him, but it must also appear that he is unable to provide the necessities of life. Welfare and Institutions Code, § 3005.

See Words and Phrases, Permanent Edition, for all other definitions of "Needy Blind Person".

5. Paupers ⚷43(2)

In fixing blind aid, blind person's present income should be considered, and his resources under certain circumstances, notwithstanding that casual income and inconsequential resources should be disregarded. Welfare and Institutions Code, § 3084.

6. Paupers ⚷41

In passing on blind aid applications, welfare boards can exercise a certain amount of discretion and should consider both the surrounding circumstances and the amount and character of property owned by applicant, even though this be less than $3,000, in order to intelligently decide as to applicant's eligibility for aid and the amount thereof necessary in fairness both to applicant and to the public. Welfare and Institutions Code, §§ 3047, 3084.

7. Paupers ⚷43(2)

The State Welfare Board can adopt rules and regulations fixing maximum amount which blind person may be allowed to keep and still receive aid. Welfare and Institutions Code, §§ 3047, 3075.

8. Paupers ⚷43(2)

The regulation of State Welfare Board permitting blind persons to retain personalty valued at $600 and still receive aid was not capricious, and was not in conflict with statute providing that blind aid shall not be received by person owning personalty in excess of $3,000. Welfare and Institutions Code, §§ 3047, 3075.

9. Paupers ⚷41, 43(2)

Applications for blind aid should be heard and determined on the facts of each case, and a reasonable discretion should be exercised by welfare boards charged with administering the act, and the needs of blind person, in view of his own circumstances, should be the controlling factor. Welfare and Institutions Code, § 3000 et seq.

10. Paupers ⚷43(2)

A blind person, who received legacy consisting of cash and securities and who was found by State Welfare Board to possess personalty amounting to $2,320, more than $600 of which was in cash and securities, was not entitled to blind aid under statute providing that blind aid shall not be received by person owning personalty in excess of $3,000 and regulation of Social Welfare Board permitting blind person to retain personalty valued at $600 and still receive aid. Welfare and Institutions Code, §§ 3000 et seq., 3047, 3075.

◆

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Mandamus proceeding by Mary Jane Newbold, by and through her guardian, Paul Beckman, against Social Welfare Board of the State of California and others to compel the respondents to determine petitioner's right to blind aid. From the judgment, the respondents appeal.

Reversed.

Robert W. Kenny, Atty. Gen., and Clarence Linn, Deputy Atty. Gen., for appellants.

Sharpless Walker and James E. Walker, both of Santa Ana, for respondent.

BARNARD, Presiding Justice.

In June, 1943, the petitioner, who had been receiving aid as a needy blind person, received a legacy consisting of cash and securities amounting to $2653.65. It is conceded that the combined value of this legacy and her other personal property did not exceed $3000. Based on this change in her circumstances the board of supervisors discontinued such aid to the petitioner on June 30, 1943. That action was affirmed by the State Social Welfare Board, that board finding that the petitioner possessed personal property amounting to $2320; that since she owned more than $600 in cash and securities and had no plan for rehabilitation the discontinuance of such aid by the county was proper; that a regulation adopted by the State Social Welfare Board provides that aid to needy blind may not be granted where cash or securities owned are in excess of $600, unless there is a plan for and the ability to provide for rehabilitation; and that this regulation is not contrary to the provisions of the Welfare and Institutions Code.

The petitioner then filed an action in the superior court asking for a review of the entire proceedings and for the issuance of a writ of mandate compelling the respondent boards to admit her to the enjoyment of the rights to which she is entitled under Division 5 of the Welfare and Institutions Code. The matter was submitted on the pleadings which disclose all the material facts, and a judgment and order was entered directing the issuance of a peremptory writ of mandate requiring the respondent boards to admit the petitioner to the enjoyment of the rights to which she is entitled under Division 5 of the Welfare and Institutions Code, and "to determine petitioner's right to blind aid from the 30th day of June, 1943, hence, disregarding for purposes of determining her eligibility the first $3000.00 in real and/or personal property which it is found that she has possessed since the 30th day of June, 1943." This appeal followed.

The appellants contend that the administration of aid to the needy blind under the provisions of Ch. 1, Pt. 1, Div. 5 of the Welfare and Institutions Code is based upon the need of the applicant, that the regulation adopted by the state board, to the effect that blind persons owning personal property in excess of $600 are not then in need, is a reasonable regulation, and that this regulation and the denial of aid to this respondent are not in conflict with the pertinent provisions of the Welfare and Institutions Code, but are in accordance with the purpose and intent of those provisions. On the other hand, the respondent contends that the regulation above referred to is in direct conflict with section 3047 of the Welfare and Institutions Code, which provides: "Aid shall not be received under the provisions of this chapter by any person who owns personal or real property, or both, the county assessed valuation of which, less all incumbrances thereof of record, is in excess of three thousand dollars." It is then argued that the plain meaning of this statute is that any blind person who owns not to exceed $3000 in personal property is eligible for blind aid and cannot be excluded from the benefits of such aid insofar as any property qualification is concerned. In other words, it is contended that such a person is entitled to such aid regardless of any circumstances surrounding the possession or possible use of such funds, and that no discretion in this regard is left to the boards in charge of administering such aid.

[1] We think this contention not only misconstrues the purpose and intent of section 3047 but ignores and leaves out of consideration the effect of other provisions of chapter 1 of division 5 of that code, covering the matter of aid to the needy blind. Section 3047, so far as material here, provides that aid shall not be received by any person who owns personal property with an assessed valuation in excess of $3000. While this declares the ineligibility of those having property beyond this limit, it neither expressly makes eligible one having property up to that amount, nor declares that the ownership of property up to that limit shall be disregarded in passing upon other necessary qualifications of such an applicant, including the basic one of his need for such aid. The amount thus fixed by section 3047, beyond which an applicant becomes ineligible for such aid, seems to have been intended as a maximum amount which the board, in exercising its discretion in view of other circumstances, may allow an applicant to retain in any case, and not a standard or fixed amount which an applicant must be allowed to retain in any event, regardless of other considerations.

[2-5] Section 3047 should be interpreted in connection with and as a part of other provisions of the legislation providing for aid to the needy blind. This legislation was adopted for the purpose of operating in connection with the federal system of such aid, and with a view to obtaining federal assistance in providing such aid to needy blind persons. Section 1002 of Title 10 of the Federal Social Security Act, 42 U.S.C.A. § 1202, provides: "A State plan for aid to the blind must * * * provide that the State agency shall, in determining need, take into consideration any other income and resources of an individual claiming aid to the blind * * *." Section 103.6 of the Welfare and Institutions Code declares that aid to the needy blind is a matter of statewide concern and designates a state board as the agency to act with full power to supervise this form of assistance in order to secure full compliance with the provisions of Title 10 of the Federal Security Act, 42 U.S.C.A. § 1201 et seq. Section 3075 of this code authorizes the department of social welfare to make rules and regulations to carry out the provisions of this chapter which shall be binding upon the boards of supervisors of the various counties but which, however, may not conflict with the statutory provisions of this chapter. Other sections of this chapter provide for the investigation of applications, the taking of proof, and for an appeal to the state board from the decision of the county board of supervisors when any applicant is dissatisfied therewith. In making such investigations and decisions the boards of supervisors are bound, and in making rules and regulations the state board is bound, by other sections of this chapter, including 3005 and 3084. Under the basic definition contained in section 3005 a person is not a needy blind person merely because his income is not sufficient to support himself. It must also appear that he is unable to provide himself with the necessities of life. A very wealthy person, with his assets in the form of cash in a lock box, might have no income but it could not be said that he was unable to provide himself with the necessities of life. And section 3084, in fixing the amount that shall be ordered to be paid, if the board of supervisors is satisfied that an applicant is entitled to aid, requires a consideration not only of the present income of the applicant but also, under some circumstances, of "resources." While "casual income and inconsequential resources" are to be disregarded, the possession of other resources would necessarily call for some consideration. In applying these sections in a particular case a great variety of questions and problems will necessarily arise. Obviously, the character and kind of the property owned has an important bearing on the ability of the owner to provide for himself and on the actual need of an applicant, as referred to in section 3084. The ownership of a small house, for instance, not only has a bearing on the amount of aid that may be necessary, but it might well justify allowing the owner to retain it

rather than having it considered as an asset enabling the applicant to provide for himself, especially under circumstances where this appeared to be for the benefit of all parties concerned. On the other hand, the possession of $3000 in cash might well be taken as establishing the fact that the applicant is not unable to provide for himself while that situation prevails.

[6-8] From a consideration of these other statutory provisions, with the variety of problems and various sets of circumstances which must be expected in dealing with a large number of applications for such aid, it seems to necessarily follow that the various boards charged with the duty of passing upon applications for aid have, and must have, the right to exercise a certain amount of discretion, and that they must take into consideration both the surrounding circumstances and the amount and character of property owned by an applicant, even though this be less than $3000, in order to intelligently decide as to the eligibility of the applicant for such aid and the amount thereof that may be necessary in fairness both to him and to the public. That factual situation and the provisions of section 3075 justify and authorize the making of rules and regulations for the purpose of carrying out the provisions of this legislation. While it may be conceded that, in fairness to all, some amount of quick assets should be allowed to an applicant to cover emergencies, without too strict an application of the provisions with respect to his ability to presently provide for himself, the fixing of a maximum amount that may be thus allowed is properly one of those things which may be covered by rules and regulations adopted by the State Welfare Board. This has been done in the regulation in question, providing that in all cases an applicant may retain personal property up to the value of $600 without affecting his eligibility and right to receive such aid. There is nothing in the record before us to indicate that the existing regulation in this regard is unreasonable, arbitrary or capricious, and in view of the necessity and propriety of considering the provisions of this legislation as a whole, it cannot be said that this existing regulation is in conflict with the provisions of section 3047.

[9, 10] Clearly, it was intended that such applications for aid should be heard and determined on the facts and circumstances of each case; that a reasonable discretion should be exercised by the various boards charged with administering the act; and that the needs of the applicant, in view of his own circumstances, should be the controlling factor. While the language of the statutes is not as clear as might be desired we think it also sufficiently appears, from a consideration of this legislation in its entirety, that while it was intended to give the administering boards some leeway in individual cases, without a requirement that an applicant must use up his last dollar of assets before being considered unable to provide for himself, it was further intended by section 3047 to fix an outside limit upon the amount of assets which an applicant might be permitted to retain, and that it was not intended thereby to fix an amount which must be allowed to an applicant in all cases and without regard to the surrounding circumstances. We, therefore, hold that the respondent was not entitled, as a matter of right and in any event, to retain any assets she had up to the amount of $3000, and that the trial court was in error in holding and adjudging that the appellants must, in determining the respondent's rights to such aid and in determining her eligibility therefor, disregard the first $3000 in assets which it was found that she possessed.

The opinion herein expressed as to the validity of the questioned regulation adopted by the State Welfare Board is confined to the facts here appearing, and nothing herein is intended as passing upon the validity of that regulation under other facts or circumstances, or in connection with other questions which might conceivably arise.

The judgment appealed from is reversed.

MARKS, J., concurs.

76 Cal.App.2d 872

SILVERSTEIN v. SILVERSTEIN.

Civ. 13168.

District Court of Appeal, First District.
Division 2, California.
Nov. 22, 1946.

1. Divorce ⚿184(10)

Whether conduct of husband or wife constitutes such cruelty as warrants the granting of a divorce is largely a question of fact to be determined by trial court whose conclusion cannot be disturbed on appeal unless it is without any substantial support in the evidence.

2. Divorce ⚿130

Evidence sustained finding of extreme cruelty of husband as ground for granting wife a divorce.

3. Divorce ⚿162

General findings in interlocutory decree of divorce that all allegations contained in wife's second cause of action for divorce on ground of extreme cruelty were true and that allegations in husband's cross-complaint were untrue and that wife was entitled to interlocutory decree of divorce were sufficient to sustain judgment, though decree contained no finding as to first cause of action based on wilful neglect. Code Civ. Proc. § 632.

4. Husband and wife ⚿249

Property may be community property because of its origin and the intention of the spouses, though recorded as held in joint tenancy.

5. Divorce ⚿253

Husband's admission in pleading that home was community property must control in support of trial court's findings to that effect in wife's action for divorce as against his testimony that he made out a joint tenancy deed as to such property.

6. Divorce ⚿203

Where both husband and wife in action and cross-action for divorce prayed for equitable division of the community property and mentioned in such respect their home, trial court had jurisdiction to determine whether such home was community property.

7. Divorce ⚿286

Decision of trial court, having jurisdiction in divorce action to determine the status of certain property, that such property is community property will not be disturbed on appeal if supported by any substantial evidence.

8. Divorce ⚿253

Husband's admission in verified pleading that home was community property and his testimony to the same effect constituted substantial evidence in support of trial court's finding that such home was community property of the parties.

◆

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action for divorce by Rose Silverstein against Louis A. Silverstein, wherein defendant filed a cross-complaint for divorce. From an interlocutory decree in favor of plaintiff, defendant appeals.

Affirmed.

Joseph A. Brown, of San Francisco, for appellant.

Leon A. Blum, of San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an action for divorce terminating in an interlocutory decree in favor of the wife, plaintiff, and the husband appeals.

The complaint is in two counts, the first on the ground of wilful neglect, the second on the ground of extreme cruelty stated in general terms. The answer denies the material allegations of both counts to which is added a cross-complaint for divorce on the ground of extreme cruelty stated in general terms. Both the complaint and cross-complaint contain allegations that there is community property of the parties among which is specifically mentioned in both pleadings: "Home at 1669 Silver Avenue, San Francisco, California." Both parties pray for an equitable division of the community property.

The court did not make separate findings of fact and conclusions of law, but included the following words in its Interlocutory Decree of Divorce and Award of Community Property: "the court finds that all the allegations contained in the 'Second Cause of Action' of plaintiff's complaint are true, and that the allegations contained in paragraph VI of defendant's cross-complaint heretofore filed in these proceedings are not true, and that plaintiff is entitled to an interlocutory decree of divorce against the defendant upon the ground of defendant's extreme cruelty and to an award of a portion of the community property of the parties as hereinafter specified, and that plaintiff is likewise entitled to alimony in the amount and upon the conditions hereinafter set out."

Of the community property the home at 1669 Silver Avenue was awarded to the wife, her alimony of $40 a month to cease if she should dispose of that home or cease to make her permanent residence therein. The custody of the two minor children was awarded to plaintiff.

Appellant's first point is that the evidence is insufficient to prove his extreme cruelty. The evidence is conflicting. The wife testified, fully corroborated by both children of the parties, the daughter over nineteen and the son nearly eighteen, that for many years she had great difficulty in getting money from her husband especially for her personal needs and that he humiliated her continually in the presence of the children, calling her dumb and ignorant, telling her to go away and get a divorce, reviling her and threatening her with violence. This evidence is too clear and express to require literal quotation. Appellant, as only witness in his own behalf, denied these charges and ascribed the arguments with his wife to her wish for expenditures beyond his income and to her desire to live in Los Angeles near her family. Appellant argues that his limited salary and financial reverses were the crux of the question, and that even undue penuriousness of a husband towards his wife does not constitute extreme cruelty, citing Parnay v. Parnay, 55 Cal.App.2d 703, 131 P.2d 562. The case is not in point. There the divorce had been denied by the trial court and the District Court of Appeal affirmed, holding that undue penuriousness of the husband did not constitute extreme cruelty as a matter of law. Here the evidence showed other improper conduct of the husband towards the wife over and above his lack of liberality towards her, and the trial court found that his conduct was a ground for divorce.

[1, 2] Whether such acts and conduct constitute such cruelty as, under all the circumstances shown, warrant the granting of a divorce is largely a question of fact to be determined by the trial court; its conclusion cannot be disturbed on appeal unless it is without any substantial support in the evidence. Andrews v. Andrews, 120 Cal. 184, 52 P. 298; Robinson v. Robinson, 159 Cal. 203, 113 P. 155. In this case, though it is apparent that much of the friction arose from the wife's demands upon the meager income of appellant, there is substantial evidence to support the finding of the husband's cruelty.

[3] Appellant argues that since there was no waiver of findings as required by section 632 of the Code of Civil Procedure, specific findings should have been made on all material issues, and that the general findings included in the Interlocutory Decree of Divorce are insufficient to support the judgment. The contention is without merit. "Findings contained in the judgment itself are sufficient. Hopkins v. Warner, 109 Cal. 133, 41 P. 868; Hibernia Sav. & Loan Soc. v. Clarke, 110 Cal. 27, 32, 42 P. 425; Locke v. Klunker, 123 Cal. 231, 55 P. 993." Shaingold v. Shaingold, 191 Cal. 438, 439, 216 P. 603; Estate of Janes, 18 Cal.2d 512, 116 P.2d 438.

In Dracovich v. Dracovich, 53 Cal.App. 361, 200 P. 44 general findings of the same kind as those in the case at bar were incorporated in the same document with the interlocutory decree. The court held, 53 Cal.App. at page 363, 200 P. at page 44: "The findings are sufficient in form and dispose of every issue in the case. The finding that 'all the allegations contained in the complaint are true' is a sufficient finding upon each and every issue arising out of the complaint and the denials in the answer. Such a finding has repeatedly been upheld by our Supreme Court. See Gale v. Bradbury, 116 Cal. 39, 47 P. 778, and McKelvey v. Wagy, 157 Cal. 406, 108 P. 268." See also Kemp v. Campbell, 9 Cal. App.2d 298, 49 P.2d 872, 873.

Appellant cites Krug v. F. A. Lux Brewing Co., 129 Cal. 322, 61 P. 1125, and some other cases of the same tenor in support of his contention that general findings referring to the allegations of the pleadings are insufficient. These cases do not hold so. They only condemn reference to the allegations of the pleadings made indecisive by unclear qualifications as "so far as they are inconsistent with the allegations of said complaint" or "material" or "in issue". The Krug case itself states, 129 Cal. at page 323, 61 P. at page 1126: "Of course, as was held in Williams v. Hall, 79 Cal. 606, 21 P. 965, and in many other cases, a finding that 'all the allegations of the complaint are true, and all the averments of the answer are untrue,' is sufficient." That the decree in this case does not contain a finding as to plaintiff's first cause cause of action based on wilful neglect is immaterial, as the finding that the allegations of the second cause of action are true sufficiently supports the decree. Brison v. Brison, 90 Cal. 323, 329, 27 P. 186; 24 Cal.Jur. 939, Trial, § 184.

[4] Appellant contends that the court had no power to include in the award of community property to the wife the home of the parties at 1669 Silver Avenue, San Francisco, because appellant had testified that he had made out a joint tenancy deed of that property and that he assumed that he and his wife both owned it at the moment. Appellant and his wife had both declared in their verified pleadings that the home was community property. After making the statement referred to above appellant answered, "That's right" to a question which included said home in the community property for the determination of its value. These different statements by the appellant are not necessarily conflicting. Property can be community property because of its origin and the intention of the spouses though recorded as held in joint tenancy.

In Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905, it was held that evidence was admissible to prove that property of the spouses was community property even though the deeds named them as joint tenants, the court stating, 23 Cal.2d at page 757, 146 P.2d at page 907: "It has in fact been held unequivocally that evidence is admissible to show that husband and wife who took property as joint tenants actually intended it to be community property. Hulse v. Lawson, 212 Cal. 614, 299 P. 525; Jansen v. Jansen, 127 Cal.App. 294, 15 P.2d 777; see Minnich v. Minnich, 127 Cal.App. 1, 8, 15 P.2d 804; Horsman v. Maden, 48 Cal.App.2d 635, 640, 120 P.2d 92. * * *. Moreover, it is well settled that property may be converted into community property at any time by oral agreement between the spouses (Kenney v. Kenney, 220 Cal. 134, 30 P.2d 398; In re Estate of Watkins, 16 Cal.2d 793, 797, 108 P.2d 417, 109 P.2d 1; Title Insurance etc. Co. v. Ingersoll, 153 Cal. 1, 94 P. 94; In re Estate of Kelpsch, 203 Cal. 613, 265 P. 214, and an agreement at the time the property is acquired has the same effect." The same case also argues in detail (23 Cal.2d 758, 146 P.2d 907) that Siberell v. Siberell, 214 Cal. 767, 7 P. 2d 1003 cited by appellant is not contrary to this rule, at least not the decision itself.

[5, 6] In this case, therefore, appellant's statement that he made out a joint tenancy deed need not impair at all the value of the statement of both himself and his wife that the home was community property. His further testimony "Q. You both own the property at the moment? A. I assume that is right", is irrelevant in that respect as there is no statement whether he asumes that they own it as joint tenants, or as community property. But even if we assume that it was appellant's intention to testify—what he did not do expressly—that the home was joint and not community property, the admission in his pleading, which he did not try to amend must control as against his testimony in support of the finding by the court that the home was community property. Estate of Cover, 188 Cal. 133, 147, 204 P. 583. At any rate the trial court had jurisdiction to determine

whether the home was community property or not, as both parties had prayed for equitable division of the community property and had mentioned the home in that respect. Allen v. Allen, 159 Cal. 197, 113 P. 160; Salveter v. Salveter, 206 Cal. 657, 275 P. 801.

[7, 8] That the decision will not be disturbed on appeal if there is any substantial evidence in the record to support it is too elementary to require citation of authority. In this case appellant's admission in his verified pleading and his testimony to the same effect constituted such substantial evidence.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

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77 Cal.App.2d 1

JEGEN v. BERGER.

Civ. 13117.

District Court of Appeal, First District, Division 1, California.

Nov. 25, 1946.

1. Assignments ⇨109

An assignee of rights and benefits under a contract is not by reason of fact of assignment alone liable to perform assignor's obligations under the contract.

2. Contracts ⇨147(1)

The function of all interpretation of contracts is to ascertain true intent of the parties.

3. Evidence ⇨397(1), 455

Parol evidence should not be admitted to vary, to add to, or to subtract from terms of a written agreement, but it is admissible to explain what the parties meant by what they said. Code Civ.Proc. §§ 1856, 1860.

4. Contracts ⇨148, 169

Trial court, as an aid in discovering intention of the parties to a contract, may look to circumstances surrounding making of agreement, including the object, subject matter of the writing and preliminary negotiations between parties, and thus place itself in same situation in which parties found themselves at time of contract.

5. Contracts ⇨170(1)

Where a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be enforced by the court.

6. Contracts ⇨147(1)

In construing a contract, it is duty of court to give effect to the intention of the parties where such intention is not wholly at variance with the correct legal interpretation of terms of the contract.

7. Contracts ⇨170(1)

A practical construction placed by the parties to a written contract upon instrument is the best evidence of their intention.

8. Evidence ⇨450(5)

Language in written contract under which plaintiff took over laundry supply business, together with all of assignor's "rights, title and interest in certain conditional contracts of sale" to named buyers as per attached list, which list included conditional contract for purchase of mangle by defendant, was sufficiently ambiguous as to whether plaintiff assumed his assignor's obligation upon a one year guarantee on the mangle to authorize admission of parol evidence.

9. Evidence ⇨424

Parol evidence rule does not apply when a person seeking to introduce it was not originally a party to the contract, and is not the successor or assign of a party to it.

10. Appeal and error ⇨1008(1)

District Court of Appeal will not interfere with conclusions of triers of fact unless it can be said, as a matter of law, that evidence in respondent's favor does not support such conclusions.

11. Appeal and error ⇨931(1)

In determining whether there was substantial evidence to support trial court's finding of fact, all conflicts must be resolved in respondent's favor.

12. Sales ⚷481

Evidence supported finding that plaintiff in taking over laundry supply business, together with all of assignor's "rights, title and interest in certain conditional contracts of sale" to named buyers as per attached list, which list included a conditional contract for purchase of a mangle by defendant, assumed his assignor's obligation upon a one year guarantee on the mangle, so that he could be held liable thereon.

13. Damages ⚷62(1)

A person injured by wrongful act of another has duty to exercise reasonable care to avoid loss or to minimize resulting damages.

14. Sales ⚷481

Evidence supported finding that defendant had exercised reasonable care to avoid loss and minimize damages on discovering that mangle, which he had purchased from plaintiff's assignor under contract containing a one year guarantee, was defective, so that he was not precluded from recovering loss of profits in his laundry business as result of breach of the guarantee.

15. Appeal and error ⚷1050(1)

In action to recover balance allegedly due on conditional sales contract for purchase of mangle, wherein defendant filed cross-complaint seeking to recover for loss of profits in his laundry business as result of breach of one year guarantee contained in the sales contract, admission of evidence as to telephone conversation between defendant and employees of plaintiff's assignor concerning alleged defects in the mangle was not error, in absence of showing that anything was said by employees which could have been prejudicial either to assignor or to plaintiff.

16. Evidence ⚷539, 540

A defendant who had been in the laundry business for 11 years, was qualified to testify that new mangle which he purchased from plaintiff's assignor was operating only at 25 per cent. efficiency when he first put it into use and as to his contemplated increase in business volume and expenses therein.

17. Evidence ⚷20(1)

It is common knowledge that during war years laundries had more business than they could handle.

18. Appeal and error ⚷1050(1)

Where defendant properly testified what his increase in volume of business and expenses would have been with new mangle which he purchased from plaintiff's assignor operating at full capacity, admission of computation of anticipated increase in volume of business and of operating expenses based upon defendant's books and verified by his bookkeeper, would not constitute prejudicial error.

19. Appeal and error ⚷1050(1)

Admission of testimony was not prejudicial, in view of previous testimony admitted for most part without objection.

20. Appeal and error ⚷882(12)

A party cannot complain if trial court gives at request of his adversary an instruction which court has also given at his request.

21. Trial ⚷241

Where defendant's cross-complaint was based on ground that plaintiff assumed his assignor's obligation on a one year guarantee contained in contract under which defendant purchased a mangle, and evidence was highly conflicting on such issue, an instruction embodying provision of statute as to assumption of obligations by acceptance of benefits was proper. Civ. Code, § 1589.

22. Novation ⚷13

Where issue on defendant's cross-complaint was whether plaintiff, in receiving assignment of conditional contract for sale of mangle to defendant, assumed his assignor's obligation on the one year guarantee contained in the contract, and plaintiff's assignor together with plaintiff were named as cross-defendants therein, instructions given at request of plaintiff's assignor concerning novation were authorized under evidence.

23. Damages ⚷40(1)

The award of damages for loss of profits depends upon whether there is a satisfactory basis for estimating what probable earnings would have been had there been no tort.

24. Damages ⚷40(1)

If there has been operating experience sufficient to permit a reasonable estimate of probable income and expenses, damages for loss of prospective profits are awarded.

25. Damages ⚷40(1)

One whose tort made it impossible for another to realize any profit could not complain if probable profits of injured party were of necessity estimated.

26. Sales ⚷481

Evidence supported award of $4,000 to defendant on his cross-complaint for loss of profits in his laundry business as result of lack of fitness for its intended purpose of mangle which defendant had purchased from plaintiff's assignor under contract containing a one year guarantee.

◆

Appeal from Superior Court, San Francisco County; Melvyn I. Cronin, Judge.

Action by Margin Jegen, doing business as Laundry Equipment Company, against Louis Berger, individually and doing business as Berger's Laundry, to recover the unpaid portion of contract price for a mangle, wherein the defendant filed a cross-complaint in which he joined plaintiff and another as cross-defendants, alleging a loss of profits in the laundry business as result of lack of fitness of the mangle for its intended purpose. From a judgment in favor of defendant upon his cross-complaint against the plaintiff, the plaintiff appeals.

Affirmed.

Edward Dienstag, of San Francisco, for appellant.

Frank J. Perry and George Olshausen, both of San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

In August, 1941, one George D. Klein sold a mangle or ironer to respondent under a conditional sale contract. Appellant Jegen, as the assignee of Klein, filed suit against respondent to recover the unpaid portion of the contract price, $965.66. Respondent answered, and also filed a cross-complaint in which he joined appellant Jegen and his assignee Klein as cross-defendants, alleging a one year guarantee in the original sales contract, a lack of fitness of such mangle for its intended purposes, and praying that he have judgment for $12,000 for loss of profits in his laundry business as a result thereof. The jury found in favor of respondent upon his cross-complaint and awarded him $4,000 damages against plaintiff and appellant Jegen, but the jury also found in favor of cross-defendant Klein. From the judgment entered upon the verdict plaintiff and cross-defendant Jegen appeals.

As grounds for the reversal of the judgment appellant urges the following: (1) That the record is devoid of evidence showing an assumption by him of the "one year guarantee" provisions of the sale contract between his assignor (Klein) and respondent; (2) that respondent failed in his duty to minimize damages; (3) that the court erred in ruling on testimony and in giving certain instructions to the jury; (4) that there is no evidence of loss of profits to support the award of $4,000 damages.

Before discussing these contentions we shall briefly summarize the evidence.

The record shows that late in August, 1941, respondent and George Klein entered into the conditional sale contract whereunder respondent purchased the mangle involved herein. The contract provided that the "reset shirt unit" sold to Berger was "guaranteed for 1 year."

Under the terms of the agreement, the full purchase price for the machinery was $2,188.75, and it was to be delivered to respondent's laundry in San Mateo. The mangle was delivered to respondent in February, 1942. It was not immediately put into operation, but instead, respondent waited for Klein to paint it. After such painting, it was tested late in March, 1942, and it was discovered that when the motor was started "the machine went away too fast." A jackshaft was then installed in the mangle to remedy that condition, and it was finally set up for operation in the "early part of April," 1942.

Prior to and at the time that the mangle was first placed into use, respondent had also in operation in his laundry a "French gas mangle" which was operating to capacity. Respondent testified that by then employing the new 120 inch mangle he would get therefrom, on his then business volume (April, 1942), 25% of the volume of production which it was actually capable of handling. He also said that by using the new mangle the normal increase of the volume of his business (from April, 1942) would be about 10% per month for six or eight months to bring his output capacity up to 100%. He also testified, correlatively, that his operating expenses (on that anticipated expansion in volume of work produced) would increase 2% per month until the mangle reached its production capacity.

In this respect, it should here be noted that during the month of April, 1942 (when the mangle was installed) respondent did volume business in the amount of $1,112.22, and had operating expenses in the sum of $465.23. Net profit for the month (adding depreciation of $100.43 to the operating expenses) was $546.56.

After the mangle was set up for use, it was noticed that there were "at least four" "spots" on the mangle cylinder, apparently caused by improper soldering. It would appear that such spots interfered with the evenness of ironing of the material placed into the mangle. It was next noticed that the frame of the mangle was cracked in two places. Two days after the mangle was put into operation, a certain "pinion" gear therein broke, and by virtue of such breakdown, use of the mangle ceased for "about a day." It then developed that the mangle "fed lopsided," which condition persisted during the entire time respondent used it. Certain other "cluster gears" broke down after the mangle had been in use for "a week or ten days." Certain other defects arose therein, and, in July, 1942, respondent had to discontinue all further use of the mangle.

The record further shows that about "10 days or 2 weeks" after the new mangle was installed in respondent's shop, he dismantled his French gas mangle. The French mangle was not capable of producing the quantity of work which could be handled by the 120 inch mangle, and, although respondent knew of some defects in the new mangle before he dismantled the French mangle, he thought that the new one would be repaired.

Sometime around June or July, 1942, appellant Klein negotiated for the transfer to appellant of Klein's laundry supply business. The contract which consumated those negotiations was executed on August 10, 1942. It is evident from the terms of that transfer agreement that appellant took over the entire machinery, equipment and stock in trade of Klein's business, together with all of Klein's "right, title and interest in certain conditional contracts" of sale to named buyers, as per an attached list. Respondent's contract was on that list. Certain obligations of Klein were, by the terms of the contract, assumed by appellant, but *no express assumption* by appellant of Klein's responsibility to respondent on the mangle guarantee was set out in the contract.

Further portions of the evidence will be set forth in connection with our discussion of the contentions made by appellant hereinbefore enumerated.

Appellant's first contention is that the record is devoid of evidence showing an assumption by him of the "one year guarantee" provision of the sale contract between his assignor (Klein) and respondent. Appellant argues that the contract between Klein and himself did not contain an assumption of the guarantee, that the contract was never reformed or modified to provide for such an assumption, and that he never by any words or actions after the contract was executed held himself out to respondent as assuming the guarantee responsibility. Respondent in reply argues that the two contracts, considered together, show an assumption; that parol evidence was admissible to prove such assumption; that appellant subsequently held himself out as being bound by the guarantee; and that, under section 1589 of the Civil Code which states that "voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting," appellant was liable.

[1] Appellant cites a number of cases which recite the familiar and well-settled rule that an assignee of rights and benefits under a contract is not, by reason of the fact of assignment alone, liable to perform his assignor's obligations under the contract. But, as was stated by our Supreme Court in the case of Weidner v. Zieglar, 218 Cal. 345, at page 349, 23 P.2d 515, 517: "Considerable time and attention is devoted by counsel to the authorities dealing with the assumption of liability under a contract by an assignee thereof. There is nothing mysterious about the rule of law announced therein, nor is there any conflict in the cases when read in the light of that which governs, to wit, *the intent of the parties, construed either by their acts, the subject-matter of the contract, or their words.*" (Emphasis added.)

The record shows that appellant did not pay Klein any cash for the transfer of Klein's business to him, but only assumed Klein's obligations. After the transfer, Klein went into the military service. Respondent maintains that such evidence, when considered together with the original sale contract between himself and Klein, is sufficient to illustrate, by clear inference, that appellant was to be bound under Klein's guarantee to respondent. Further, it is contended by respondent that such circumstances as are disclosed by the evidence noted above created ambiguities which were sufficient to allow parol to come in to arrive at the true intent of Klein and appellant on the matter of assumption. In this respect, the record contains Klein's testimony that appellant had agreed to accept all of Klein's "business liabilities," and that appellant had told him that he (appellant) would put the Berger mangle in "good mechanical condition."

[2, 3] Appellant argues that there is no ambiguity in the contract between himself and Klein, and that parol evidence was inadmissible. In the recent case of Wells v. Wells, Cal.App., 169 P.2d 23, this court said at page 26:

"The appellant assumes that the above quoted agreement is clearly an agreement for the assignment of wages, and argues that where a contract is clear on its face it is error to admit parol evidence for the purpose of ascertaining the intent of the parties. There has been much written on this subject and it is quite apparent that there is some difference of opinion among the members of the Supreme Court of this state on this issue. (See Universal Sales Corp. v. Cal., etc., Mfg. Co., 20 Cal. 2d 751, concurring opinion, page 776, 128 P.2d 665, 679; In re Estate of Rule, 25 Cal.2d 1, dissenting opinion page 17, 152 P.2d 1003, 1011, 155 A.L.R. 1319; see, also, Ermolieff v. R. K. O. Radio Pictures, 19 Cal.2d 543, 122 P.2d 3; see, also, an article by James P. McBaine entitled 'The Rule against Disturbing Plain Meaning of Writings,' 31 Cal.Law Rev. 145; an article by Oliver Wendell Holmes entitled: 'The Theory of Legal Interpretation,' in 12 Harvard Law Rev. 417; 9 Wigmore on Evidence, 3rd Ed., §§ 2458-2478.) Much can be said in support of the rule that parol evidence is not only admissible to explain an ambiguity appearing on the face of the document but is also admissible to show that what appears to be a perfectly clear agreement, in fact meant something entirely different to the parties. This seems to be the theory of our statutory law. Section 1856 of the Code of Civil Procedure provides that except in the cases of mistake or imperfection of the agreement, or where the validity of the agreement is in fact in dispute 'no evidence of the terms of the agreement other than the contents of the writing' is admissible, but that 'this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section 1860.' Section 1860, without limitation, provides: 'For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret.'

"The function of all interpretation is, of course, to try to ascertain the true intent of the parties. Parol evidence should not be admitted to vary, to add to, or to subtract from the terms of a written agreement, but it should be, and is admissible, to explain what the parties meant by what they said."

[4-7] And in Universal Sales Corp. v. California, etc., Mfg. Co., 20 Cal.2d 751, at page 761, 128 P.2d 665, 671, our Supreme Court said: "As an aid in discovering the all important element of intent of the parties to the contract, the trial court may look to the circumstances surrounding the making of the agreement (citing many authorities) including the object, nature and subject matter of the writing (citing three authorities) and the preliminary negotiations between the parties (citing two authorities), and thus place itself in the same situation in which the parties found themselves at the time of contracting. (Citing four authorities.) Also applicable here is the familiar rule that when a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court. (Citing two authorities.) The reason underlying the rule is that it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract, and a practical construction placed by the parties upon the instrument is the best evidence of their intention. (Citing two authorities and quoting from another.)"

[8] We are convinced that, measured by the principles set forth in the foregoing authorities, and considering the language of the contract between Klein and appellant and the circumstances surrounding its execution, parol evidence was not only admissible, but was necessary in order to fully understand what was meant by the parties.

[9] Furthermore, one of the exceptions to the parol evidence rule is that it does not apply when the person seeking to introduce it was not originally a party to the contract, and is not the successor or assign of a party to it. As was said in the case of Greve v. Echo Oil Company, 8 Cal.App. 275, at page 279, 96 P. 904, 906: "'Where the controversy is between a party to a written contract and one who is neither a party to it nor a privy to one who is, the rule excluding parol evidence to explain, vary, modify, or contradict the writing does not apply. In such case neither the party nor the stranger to the contract is bound by the rule excluding parol evidence.'" See also Dunn v. Price, 112 Cal. 46, 44 P. 354; Spraul v. Garliepp & Mack, 138 Cal.App. 491, 32 P.2d 657; Mayfield v. Fidelity & Casualty Co., 16 Cal.App.2d 611, 61 P.2d 83.

As to appellant's contention that there was no assumption of liability by him, the record contains evidence showing that in several instances subsequent to the August 10, 1942, contract, appellant both by word and act held himself out to respondent as having assumed to make good Klein's guarantee on the mangle.

[10] While appellant refers to portions of the transcript which illustrate that he expressly repudiated any liability to assume Klein's responsibility on the guarantee, these clearly only create conflicts with those portions of the evidence which are in respondent's favor on this issue—and on which conflicts the jury found for the cross-complainant. Under well-settled rules of appellate procedure, this court will not interfere with those conclusions of the triers of fact unless it can be said, as matter of law, that the evidence in respondent's favor does not support such conclusions.

After the deal was concluded between Klein and appellant, respondent told appellant that he (appellant) should repair the mangle, and appellant told respondent to "get bids" on the repairs that had to be made. Respondent testified that he procured several bids on the work, and "a few days later" appellant visited the laundry and stated that perhaps they "should give

Ross [Ross Machine Shop] the job, because he is a reliable man." That occurred sometime during the "first part of October." Appellant (on that same day) called Ross on respondent's telephone, and asked Ross what had to be done to the mangle and what the repair charges would be. Appellant then told respondent to get a priority from the War Production Board so that Ross could get a release on a "frame" for the mangle. Shortly after respondent received the priority, two men came to his laundry representing to him that appellant had sent them to transport the mangle to Ross' shop, and those men removed the mangle from respondent's place of business. Later, and while the mangle was still in Ross' shop, respondent told appellant that certain "inspectors" had checked the mangle cylinder, and found that it could not pass inspection. Appellant replied that "he would talk to Ross" and would "take care of that part." Later, respondent heard appellant telephone Ross and instruct Ross to "proceed with the work."

[11, 12] Taking the record as a whole, and resolving, as we must, all conflicts in favor of respondent, we believe that there is substantial evidence to support the implied finding of the jury that appellant had assumed the obligation of Klein to guarantee the mangle for the one year period.

Appellant's next contention is that "assuming that there was sufficient evidence from which the jury could find that the machinery involved was defective when delivered to respondent, the respondent failed to (1) repair the machinery himself, or (2) replace it; either of which courses would have minimized any damages to a point where they would have been negligible."

Appellant argues that even if it is to be assumed that the mangle was defective when delivered, it was the duty of respondent to leave the "French gas mangle" in operating condition, and to use it while having the newer mangle repaired or replaced. Having failed to do such, appellant contends, was an unreasonable mode of action which increased respondent's alleged damages by reason of loss of profits.

In making the above contentions, appellant refers to the testimony of respondent (before noted) that defects in the new mangle were evidenced immediately after it was set up—that the frame was cracked, that the gears broke down, and that the mangle "fed lopsided." He makes further reference to the testimony of respondent that, nonetheless, the "French gas mangle" was dismantled within a week to two weeks after the new one was put into operation, and after it was evident that the new mangle was defective.

In reply, respondent contends that all he was required to do was to exercise ordinary care to insure against an unwarranted "piling up" of damages, and, if he acted reasonably in dismantling the French mangle before the new mangle was repaired or replaced, a charge of failing to minimize damages cannot be sustained. Ash v. Soo Sing Lune, 177 Cal. 356, 170 P. 843; Baker v. Borello, 136 Cal. 160, 68 P. 591. In the Baker case, supra, the court said at page 165 of 136 Cal., at page 593 of 68 P.: "A party injured by the tort of another must not, by his negligence or willfulness, allow the damages to be unnecessarily enhanced; and, if he does so, he cannot recover for the increased loss. * * * But '*the measure of his duty in this respect is ordinary care and diligence.*'" (Emphasis added.)

Respondent testified that after the complete breakdown of the mangle in July, 1942, he tried to get another mangle, and that he contacted dealers in San Francisco and "back East" for that purpose. He said that there was then "no possible chance for me to get a replacement of that type of machine anywhere. There was just not any to be had." He tried up until April, 1943, to get another mangle, but "had no success." In April, 1943, appellant drove respondent to Oakland to look at an ironer, but it was apparently decided by them that such ironer was unsuitable, too old and too expensive. It is clear, threfore, that there was evidence that respondent used due diligence in attempting to replace the defective mangle.

As to appellant's contention that respondent did not use due diligence to repair the mangle, there is sufficient evidence in the record that the words and actions of appellant were such as to induce respondent to believe that appellant had undertaken the responsibility of making the necessary repairs.

As to the dismantling of the French gas mangle by respondent, the evidence supports the implied finding of the jury that respondent had reasonable grounds for believing that the needed repairs on the newer mangle would be made and that it would soon be operating efficiently.

[13] It is a well-established rule that it is the duty of a person injured by wrongful act of another to exercise reasonable care to avoid loss or to minimize the resulting damages. This rule is well expressed in 8 Cal.Jur. 782, as follows: "It is the duty of one who knows he is threatened with detriment, either in person, property or business, through another's breach of contract or tort, to do all that he reasonably can to prevent or minimize the damage, and if he negligently fails to do this, he cannot recover for what he might have prevented. In cases of contract the duty is mutual." See also 15 Am. Jur. 426; Vitagraph, Inc. v. Liberty Theatres Co., 197 Cal. 694, 697, 242 P. 709; Schultz v. Town of Lakeport, 5 Cal.2d 377, 54 P.2d 1110, 55 P.2d 485, 108 A.L.R. 1168.

[14] However, in the instant case the evidence as to whether respondent had exercised reasonable care to avoid loss or minimize damages was highly conflicting, and the implied finding of the jury in favor of respondent upon that issue finds substantial support in the record.

[15] Appellant next contends that the trial court erred in admitting evidence of certain conversations between respondent and other persons outside of the presence of appellant. Appellant does not set out the said evidence in his brief, but a reading of the transcript reference given by appellant discloses that respondent was telephoning Klein's place of business concerning the defects in the mangle and that he was not able to contact Klein on those occasions and nothing was said by Klein's employees which in any way could have been prejudicial either to Klein or to appellant.

[16, 17] Appellant's next assignment of error is the trial court's admission into evidence, over appellant's objection, of testimony of respondent that the new mangle was operating only at 25% efficiency when first put into use in April, 1942, and that his contemplated increase in business volume would be 10% per month until the mangle reached its 100% capacity and that his operating expenses would increase 2% per month with each 10% increase in production volume. Appellant contends that the trial court erred in overruling his objection that such estimates were without proper foundation, were purely conjectural and called for the opinion and conclusion of the witness.

The record shows that Berger had been in the laundry business for 11 years. He said that the normal operating capacity of the 120 inch mangle was 18 or 20 feet a minute. He also testified that due to the failure of the mangle to operate, he had to "turn business away," and he "couldn't take care of what he had." He had to send his flatwork out to other laundries.

We think it is clear that under the evidence, respondent was qualified to testify on the matter of how much business he had to turn away, and how much was available to him if he had a completely efficient mangle with which to handle it. It is a matter of common knowledge that during the war years laundries had more business than they could handle. Likewise it was proper for him to testify on the issue of how much his operating expenses would increase with increasing volumes of business. Whether his estimates of 10% and 2%, supra, were merely conjectural (as contended by appellant) would be proper to test upon cross-examination, but certainly his testimony was admissible for what it was worth.

[18] Appellant contends also that the court erred in admitting in evidence three exhibits, one of which, exhibit 18, was a computation of the expected increase in business from April, 1942, until the guarantee ran out in March, 1943, another, exhibit 19, a computation of anticipated gross income figures contained in the last column of exhibit 18, and the third, exhibit 20, a computation of estimated loss of income due to the inability of respondent to realize

from the defective mangle its full production capacity from May, 1942, to March, 1943. It is clear that these mathematical computations were based upon the books of respondent and the anticipated increase of volume of business and of operating expenses and the figures were verified by the witness, Brown, bookkeeper of respondent, before the computations were admitted in evidence. They could add little to the testimony of respondent but served to present the figures and estimates in a form that would make the testimony easier to understand. If, as we have already held, it was proper for respondent to testify what his increase in volume of business would have been with the new mangle operating at full capacity and what his increased operating expenses would be, we can see no error in permitting the introduction of these computations as exhibits.

[19] Appellant's final contention as to improper admission of evidence is that the court erred in allowing Klein to testify over appellant's objection that appellant had bought his (Klein's) "business liabilities." A reading of the testimony of Klein shows that prior to the time this question was asked he had testified in detail as to the transaction between himself and appellant (Jegen), and that appellant (Jegen) had promised that he would take care of all necessary repairs on the mangle. In view of all this previous testimony, admitted for the most part without objection, no possible prejudice could result to appellant in permitting Klein to answer the further question as to whether appellant had purchased his "business liabilities."

[20, 21] Appellant contends that the court erred in giving respondent's instruction No. 6 embodying the provisions of section 1589 of the Civil Code as to the assumption of obligations by acceptance of benefits. However, appellant's proposed instruction No. 20, which was also given by the court, also gave in full the provisions of section 1589 and added that said section "applies only where the person accepting the benefit of the transaction is a party to the transaction, and an assignment of a contract does not carry with it the obligations of the contract unless such obligations are expressly assumed by the assignee. Such an assumption would be binding only as between the assignor and assignee and would give rise to no rights to third parties." A party is hardly in a position to complain if the court gives at the request of his adversary party an instruction which the court has also given at his request. Furthermore, as applied to the varied, lengthy and highly conflicting evidence in the instant case, an instruction embodying the provisions of said section 1589 was proper.

[22] Appellant contends also that the court erred in giving certain instructions offered by cross-defendant Klein concerning novation. Appellant does not point out wherein said instructions are erroneous, but contents himself with stating that "(1) the contract itself does not create a novation; (2) nor did the parties have any dealings concerning the contract after its execution." What we have hereinbefore set forth is sufficient to show that there was evidence from which the jury may properly have concluded that there was a novation, and the said instructions were, therefore, not improper.

Furthermore the court gave the following instruction: "The cross-complaint of Berger is directed against both Klein and Jegen. It alleges that Jegen assumed Klein's liabilities under the original contract. If you find this is true, then both Klein and Jegen are liable for all obligations under said contract, unless you also find that when Jegen assumed these liabilities (if you find he did so) Klein was released with the consent of both Jegen and Berger."

The fact that the jury brought in a verdict against appellant Jegen upon the cross-complaint but found in favor of Klein indicates clearly that the jury concluded that Jegen had assumed Klein's obligations under the contract between respondent and Klein and that Klein had been released therefrom. Otherwise they would have found against Klein also.

Appellant's final contention is that there is no evidence to support the award of $4,000 damages against appellant. Appellant asserts: "The complaint was based upon damages suffered by loss of profits. There was, however, no proof of any loss of profits." This contention of appellant is necessarily linked with his objections to respondent's testimony as to the loss of profits sustained by him in his business by reason of the defects in the mangle and its failure to function properly, which objections we have hereinbefore discussed. Appellant concedes that "loss of profits form a basis for the recovery of a judgment in the amount of such loss of profits" and that "such loss need not be directly and absolutely proved with methodical certainty" but contends that in the instant case the profits claimed were speculative and fanciful. He quotes section 3301 of the Civil Code to the effect that "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin," and makes an extended argument as to the weight of the evidence upon which respondent relied to prove damages.

[23-25] In Natural Soda Products Co. v. City of L. A., 23 Cal.2d 193, at page 199, 143 P.2d 12, 17, our Supreme Court said: "In addition to other items, plaintiff was awarded damages for loss of profits, which defendant contends was not proved with certainty. The award of damages for loss of profits depends upon whether there is a satisfactory basis for estimating what the probable earnings would have been had there been no tort. If no such basis exists, as in cases where the establishment of a business is prevented, it may be necessary to deny such recovery. (California Press Mfg. Co. Inc. v. Stafford Packing Co., 192 Cal. 479, 485, 221 P. 345, 32 A.L.R. 114; Gibson v. Hercules Mfg. Co. Inc., 80 Cal. App. 689, 252 P. 780.) If, however, there has been operating experience sufficient to permit a reasonable estimate of probable income and expense, damages for loss of prospective profits are awarded. (Sobelman v. Maier, 203 Cal. 1, 9, 262 P. 1087; Pacific Steam Whaling Co. v. Alaska Packers Ass'n, 138 Cal. 632, 72 P. 161; Landon v. Hill, 136 Cal.App. 560, 29 P.2d 281; Pye v. Eagle Lake Lumber Co., 66 Cal. App. 584, 227 P. 193; Hacker Pipe & Supply Co. v. Chapman Valve Mfg. Co., 17 Cal.App.2d 265, 61 P.2d 944.)" And on page 200 of 23 Cal.2d, at page 17 of 143 P.2d: "Since defendant made it impossible for plaintiff to realize any profits, it cannot complain if the probable profits are of necessity estimated. (Sobelman v. Maier, supra, 203 Cal. at page 9, 262 P. 1087; Schumann v. Karrer, 184 Cal. 50, 57, 192 P. 849; Meer v. Cerati, 53 Cal.App. 497, 200 P. 501.)"

And in the case of Speegle v. Board of Fire Underwriters, Cal.Sup., 172 P.2d 867, the court said at page 874: "Since proof of the damages suffered may be difficult, 'the wrongdoer may not object to the plaintiff's reasonable estimate of the cause of the injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable.' (Bigelow v. RKO Radio Pictures, Inc., [327 U.S. 251] 66 S.Ct. 574, 580.) 'The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. * * * That principle is an ancient one * * * and is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application.' (I.bid.)" See also Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 51 S.Ct. 248, 85 L.Ed. 544; Allison v. Chandler, 11 Mich. 542; Gilbart v. Kennedy, 22 Mich. 117; Bercut v. Park, Benziger & Co., 9 Cir., 150 F.2d 731.

[26] In the instant case respondent had been in the laundry business eleven years; it could reasonably be inferred therefrom that he knew the ratio of his operating expenses to his gross volume of business handled. The jury would be justified in believing his testimony that when the new mangle was installed in April, 1942, his then operating volume was only 25% of what that mangle could actually produce. His testimony that he had to turn business away—coupled with the fact that it was common knowledge that all laundries during the war years could get about as much business as they thought they might handle —would give some reasonable basis for his estimate that his business would have increased 10% per month until the mangle's capacity was reached in December, 1942.

From that month until April, 1943 [when the guarantee expired] the mangle—on his testimony—would be producing full capacity. However, he was forced to forego acceptance of all of that contemplated volume increase, this because the defective mangle impeded his capacity to "put the work out." Additionally, he testified (an before noted) some of the laundry which he did accept had to be let out by him to other laundries for ironing. While there may be some measure of uncertainty as to the amount of damages suffered by respondent, we believe that the instant case falls within the rules of the cases hereinbefore set forth, The jury was, of course, the judge of the weight of the testimony, and were entitled to rely upon the estimates of loss of business made by respondent as hereinbefore set forth. Taking, as we must, the record as a whole, we cannot say that there is not substantial evidence to support the award of $4,000 damages.

In view of the foregoing the judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

29 Cal.2d 242

TRANSPORTATION GUARANTEE CO., Limited, v. JELLINS.

S. F. 17171.

Supreme Court of California, in Bank.

Nov. 15, 1946.

Rehearing Denied Dec. 12, 1946.

1. Appeal and error 🔑544(2)

Where trial court found adversely to defendant upon all issues of fact including an issue as to the proper construction of contracts involved and the appeal was on a judgment roll alone, the findings were not open to question.

2. Appeal and error 🔑907(3)

On defendant's appeal on judgment roll alone, the Supreme Court, in determining whether the judgment should be reversed or affirmed, must construe all ambiguities in the contracts involved against the defendant and in favor of plaintiff.

3. Appeal and error 🔑907(3)

On a judgment roll appeal the presumption is that all evidence necessary to support the findings was received.

4. Appeal and error 🔑907(3)

On defendant's appeal on judgment roll alone the presumption is that evidence was received establishing that the contracts involved, at least so far as any ambiguous language is concerned, were prepared and formulated by defendant and hence were to be construed against him. Civ.Code, § 1654.

5. Appeal and error 🔑768

On defendant's appeal on judgment roll alone, plaintiff's admission in brief that a stock form of contract prepared by plaintiff was used did not require court to assume in favor of reversing the judgment that any particular clause was formulated by the plaintiff.

6. Appeal and error 🔑907(3)

On defendant's appeal on judgment roll alone, construction of contracts involved most favorable to sustaining the judgment must be indulged.

7. Contracts 🔑161

The character of a contract is not to be determined by isolating any single clause or group of clauses, but the whole of the contract must be taken together so as to give effect to every part if reasonably practicable. Civ.Code, § 1641.

8. Insurance 🔑2

In construing motor truck maintenance contracts to determine whether they were insurance contracts or not, it must be borne in mind that nearly every business venture entails some assumption of risk or some element of gambling.

9. Insurance 🔑2

Judicial construction should not extend insurance laws to govern every contract involving an assumption of risk or indemnification of loss, but each contract must be tested by its own terms as they are written, as they are understood by the parties and as they are applied under the particular circumstances involved.

10. Insurance 🔑2

The element of assumption of risk or indemnification of loss is not controlling in determining whether or not motor truck maintenance contracts are insurance contracts.

11. Appeal and error 🔑907(3)

On judgment roll appeal, provisions of motor maintenance contracts sustained trial court's conclusion that contracts were contracts for service and not insurance contracts.

12. Appeal and error 🔑1071(1)

Where plaintiff suing for breach of motor maintenance contracts did not claim to be entitled to recover as a licensed insurer, a finding that plaintiff had not qualified as an insurance company to transact insurance business was immaterial.

13. Insurance 🔑104

That plaintiff suing for breach of motor maintenance contracts did not cause motor vehicles to be covered by collision insurance did not prevent recovery where other party was not damaged by plaintiff's failure to take out such insurance.

14. Appeal and error 🔑907(3)

Where trial court found that motor truck maintenance contract was not an insurance contract and that the plaintiff did not agree to carry as an insurer any collision or other insurance on motor vehicle, on defendant's judgment roll appeal an ambiguous provision in contract would be construed in support of the judgment instead of against the judgment of the trial court for plaintiff.

15. Appeal and error ⚷907(3)

In action by plaintiff on motor truck maintenance contracts where trial court found that the contracts were contracts for service and not insurance contracts, on defendant's judgment roll appeal, appellant's contention that the fact that the plaintiff never insured either truck against collision was persuasive evidence that plaintiff never intended to carry collision insurance could not be sustained since Supreme Court was bound to presume that competent evidence sufficient to support all findings was received without objection.

16. Appeal and error ⚷544(2)

Where trial court found that the plaintiff never agreed to carry as an insurer any collision or other insurance on either of the motor vehicles covered by motor truck maintenance contracts, the finding could not be treated on judgment roll appeal as involving merely a question of law.

17. Appeal and error ⚷1008(3)

The appellate court will accept or adhere to the interpretation of a writing adopted by the trial court and not substitute its own interpretation, where parol evidence was introduced in aid of the interpretation of the contract and such evidence is not for the appellate court.

EDMONDS, J., and GIBSON, C. J., dissenting.

◆

Appeal from Superior Court, City and County of San Francisco; J. J. Van Nostrand, Judge.

Action by Transportation Guarantee Company, Limited, against Harold Jellins for breach of two certain motortruck maintenance contracts. From a judgment for plaintiff for $1,950, the defendant appeals.

Affirmed.

H. W. Glensor and Hilary H. Crawford, both of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and T. A. Westphal, Jr., Deputy Atty. Gen., amici curiæ on behalf of appellant.

Charles S. Wheeler, Jr., and Donovan O. Peters, both of San Francisco, for respondent.

SCHAUER, Justice.

[1] This case is before us on a judgment roll appeal by defendant from a judgment awarding plaintiff $1,950 damages for the breach by defendant of two certain motor truck maintenance contracts. The sole ground for reversal urged by defendant is the contention (in his language) "that the two contracts are in a material part, contracts of insurance. If this contention be upheld, then it follows as a necessary conclusion that they are void as against public policy, because it was an admitted fact at the trial, and the court found, that the plaintiff was not licensed to transact an insurance business. * * *" The trial court found adversely to defendant upon all issues of fact, including an issue as to the proper construction of the contracts, and, since the evidence is not before us, the findings are not open to question. We are satisfied, for the reasons hereafter more particularly delineated, that the judgment must be affirmed.

The two contracts in question are designated, respectively, as "Guaranteed Maintenance Contract No. 136" and "Guaranteed Maintenance Contract No. 145." Contract No. 136 relates to the maintenance of a particularly identified International motor truck and No. 145 to the maintenance of a certain Kleiber motor truck. The court found, specifically, that "in and by said contract 136, plaintiff agreed, among other things, to maintain said International motor truck in mechanical repair, to garage and fuel said motor truck and to *cause the same to be insured.* That in consideration for such *services,* defendant agreed to pay to plaintiff the sum of $55.25 per month, plus 14 cents for each mile said motor truck traveled; that said contract 136 was to continue in effect until said truck had traveled 40,000 miles from and after the date of said Contract 136"; and that "in and by said contract 145 plaintiff agreed, among other things, to maintain said Kleiber truck in mechanical repair, and to garage, fuel and *cause said truck to be insured;* that in consideration of such *services,* defendant agreed to pay to the plaintiff the sum of $49.42 per month plus 9 cents for each mile said Kleiber truck traveled; that said contract 145 was to continue in effect until said truck had traveled 90,000 miles from and after the date thereof." (Italics added.)

The court further found that plaintiff and defendant entered into Contract No. 136 on or about September 1, 1930, and into Contract No. 145 on or about June 1, 1932, and, in substantially the same language as to each contract, that "immediately upon the execution * * * [thereof] plaintiff entered into the performance of the same, and thereafter continued to perform all the terms, conditions and obligations of said contract * * * thereby imposed upon the plaintiff, to and including April 3, 1940; that on said date defendant, by notice in writing to the plaintiff, without right, cause or excuse, purported to terminate said contract * * * and repudiated the same and then and thereafter refused to permit plaintiff to continue in the performance thereof, although plaintiff was ready, able and willing to perform the same and then offered to continue in the performance."

[2-6] Certain language in the contracts, which seemingly is inconsistent with other provisions thereof, is pointed to by defendant as constituting what he claims to be "insuring clauses." Contending that the language of these clauses *can* be construed to constitute an insurance obligation it is urged that it *should* be so construed because "If there is any ambiguity [in an insurance contract] it is to be construed most strongly against the insurer." This argument is entitled to no weight since it seeks to persuade that plaintiff *is* an insurer by applying the rule that would be applicable *only if it were one.* Contrary to the rule contended for by defendant we must, on this appeal, in determining whether the judgment shall be reversed or affirmed, construe all ambiguities in the contracts against defendant and in favor of plaintiff. This is true, if for no other reason, than that on a judgment roll appeal it will be presumed that all evidence necessary to support the findings was received. (Freeman v. Gray-Cowan, Inc. (1933), 219 Cal. 85, 88, 25 P.2d 415.) In accordance with such rule it is to be presumed that evidence was received establishing that the contracts in question, at least insofar as any ambiguous language is concerned, were prepared and formulated by defendant and hence are to be construed against him. (Civ.Code, § 1654; Payne v. Neuval (1908), 155 Cal. 46, 50, 99 P. 476.) This rule would prevail as to the ambiguous language, under the circumstances shown here, even though it is asserted in plaintiff's brief that "it is plain from the face of each contract in suit that a stock form of contract was used." The admission that a "stock form of contract" prepared by plaintiff was used, does not, on a judgment roll appeal by defendant, require us to assume in favor of *reversing* the judgment, that any particular clause was formulated by the plaintiff. Obviously, the contract forms were specially filled in to cover the details of the agreement in each case. Such forms, it is entirely possible, and hence, it must be presumed, if necessary, to support the judgment, were furnished in blank by plaintiff to defendant and filled in by the latter in respect to the disputed language. In any event, the construction most favorable to sustaining the judgment must be indulged. (2 Cal. Jur. § 511, pp. 871-3; id., § 515, pp. 879-81.) It is also a rule of construction that a contract "must receive such an interpretation as will make it lawful * * * if it can be done without violating the intention of the parties" (Civ.Code, § 1643), and "may be explained by reference to the circumstances under which it was made, and the matter to which it relates" (Civ.Code, § 1647). Bearing in mind such rules of interpretation, and the fact that the findings are conclusive on this appeal, we give attention to the language designated by defendant in order to determine whether such language necessarily establishes that, as a matter of law, plaintiff was engaging in business as an insurer within the meaning of the Insurance Code (or the laws which such code superseded). If such language

does not necessarily require the conclusion that plaintiff was operating as an insurer within the contemplation of those laws then the judgment of the trial court must be upheld.

In relation to Contract No. 136, defendant selects the following language as stating the "insuring clauses" of that contract: "Contractor [plaintiff] agrees * * * (c) to insure said motor vehicle for Owner in an authorized insurance company selected by Contractor as follows:

"Public liability—$50/100,000.

"Property damage—$5000.

"Fire and theft—80% of book value.

"Collision—As under.

"Twenty-five dollars ($25.00) deductible."

Defendant further contends that the words "Collision—As under" should not be construed (as impliedly they were by the trial court) to relate to the clause "in an authorized insurance company" and to refer merely to the words immediately thereunder, "Twenty-five dollars ($25.00) deductible," but should be understood *not* to be governed by the covenant "to insure * * * in an authorized insurance company" and, furthermore, should be deemed to be controllingly related to the third paragraph of specifications of conditions under the general statement "Risk covered by Contractor upon the following conditions." The conditions so specified are as follows:

"That the Owner agrees to discharge any driver who causes Contractor's insurance company to pay claims in excess of $100.00 per year, or who shall have more than four accidents in one year upon which the driver is at fault.

"The Owner further agrees to give Contractor, or its duly authorized agent, a special power of attorney under which Contractor or said agent shall be authorized to settle by compromise, or otherwise, all insurance claims which Owner may have arising out of any of the insurance listed above.

"The Contractor agrees to make good any damage done to Owner's motor vehicle caused by collision, except the first $25.00 of each claim, which shall be paid by the Owner. In this behalf, however, it is understood and agreed that in all cases Contractor shall have the option to repair any motor vehicle which may be damaged from any cause, or to pay to Owner the value of said motor vehicle, to the extent of its book value at the time of damage."

[7] Defendant urges that the provisions of the agreement whereby the contractor agreed, in one paragraph, "to insure said motor vehicle for Owner in an authorized insurance company" covering public liability, property damage, and, upon one view of the language, collision, and, in another paragraph, agreed "to make good any damage done to Owner's motor vehicle caused by collision, except the first $25.00 of each claim, which shall be paid by the Owner" and retained "in all cases * * * the option to repair any motor vehicle which may be damaged from any cause, or to pay to Owner the value of said motor vehicle to the extent of its book value at the time of damage," must be construed as constituting an insurance contract by plaintiff. But assuming that such provisions of the contract, whether considered apart from their context or otherwise, do admit of the construction claimed by defendant it is obvious that they also may admit, at least in the light of their context and of extraneous evidence, of the interpretation given them by the trial court. The character of a contract is not to be determined by isolating any single clause or group of clauses; rather, "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ.Code, § 1641.) The agreement by plaintiff "to insure said motor vehicle for Owner in an authorized insurance company selected by Contractor as follows," etc., is not on its face an unlawful undertaking as an incident of the maintenance contract; it at least admits of an interpretation inconsistent with the theory of defendant that plaintiff himself was to act as the insurer. Likewise inconsistent with defendant's theory that plaintiff undertook to itself act as the insurer is the provision in each contract that "The liability of Contractor for damage or destruction of said motor vehicle is confined to such damage or destruction as is due to a breach by

Contractor of any of its express obligations herein contained."

[8, 9] In construing the contracts in question it must be borne in mind that nearly every business venture entails some assumption of risk, some element of gambling. The retail merchant when he purchases his stock assumes the risk of lower prices, of receding demand, of spoilage or deterioration of perishable goods; he gambles on his ability to dispose of the stock before it loses value or, perhaps, to hold it until there is an increment of value. The lawyer who contracts to prosecute a case to final judgment for a fixed or contingent fee assumes the risk of long litigation, of repeated trials and reversals. The lessee who agrees to hold his lessor harmless for damage to property of, or injury to, third persons occurring on the leased premises; the lessor who agrees to keep the premises in repair; even the surety on a note, assume a risk and indemnify another against loss. If the defense in this action is to prevail it is but another step to assert that same defense in actions arising out of any of the risk-indemnification agreements mentioned. We are satisfied that a sound jurisprudence does not suggest the extension, by judicial construction, of the insurance laws to govern every contract involving an assumption of risk or indemnification of loss; that when the question arises each contract must be tested by its own terms as they are written, as they are understood by the parties, and as they are applied under the particular circumstances involved.

[10] The opinion in Jordan v. Group Health Assn. (1939), 71 App.D.C. 38, 107 F.2d 239, 245, and that in California Physicians' Service v. Garrison (1946) 28 Cal. 2d 790, 172 P.2d 4, make it clear that the element of assumption of risk or indemnification of loss is not controlling. As stated in the Jordan case (page 247 of 107 F. 2d), "That an incidental element of risk distribution or assumption may be present should not outweigh all other factors. If attention is focused only on that feature, the line between insurance or indemnity and other types of legal arrangement and economic function becomes faint, if not extinct. This is especially true when the contract is for the sale of goods or services on contingency. But obviously it was not the purpose of the insurance statutes to regulate all arrangements for assumption or distribution of risk. That view would cause them to engulf practically all contracts, particularly conditional sales and contingent service agreements. The fallacy is in looking only at the risk element, to the exclusion of all others present or their subordination to it. The question turns, not on whether risk is involved or assumed, but on whether that or something else to which it is related in the particular plan is its principal object and purpose." In the California Physicians' Service case it is held that (28 Cal.2d 809, 172 P.2d 16.) "Absence or presence of assumption of risk or peril is not the sole test to be applied in determining * * * status. The question, more broadly, is whether, looking at the plan of operation as a whole, 'service' rather than 'indemnity' is its principal object and purpose."

[11] Here we have none of the evidence which was before the trial court; we do have the contracts as pleaded and the legal effect and interpretation thereof as found by the trial court. The covenant clauses of the contracts, stating the obligations of the plaintiff, are eloquent evidence that the controlling object of each contract is service, not insurance. Contract No. 136 shows the following:

"Guaranteed Maintenance Contract

"This Agreement * * * Witnesseth:

"Contractor agrees to maintain that certain International motor vehicle, Model 103, * * * for 40,000 miles from the date hereof as follows:

"1. At Contractor's sole cost (Standing Charges):

"(a) To furnish garage space for said motor vehicle.

"(b) To furnish state and city license fees for said motor vehicle. * * *

"(c) To insure said motor vehicle for Owner in an authorized insurance company selected by Contractor as follows:

"Public liability—$50/100,000.

"Property damage—$5000.

"Fire and theft—80% of book value.

"Collision—As under.

"Twenty-five dollars ($25.00) deductible.

"Risk covered by Contractor upon the following conditions:

"That the Owner agrees to discharge any driver who causes Contractor's insurance company to pay claims in excess of $100.00 per year, or who shall have more than four accidents in one year upon which the driver is at fault.

"The Owner further agrees to give Contractor, or its duly authorized agent, a special power of attorney under which Contractor or said agent shall be authorized to settle by compromise, or otherwise, all insurance claims which owner may have arising out of any of the insurance listed above.

"The Contractor agrees to make good any damage done to Owner's motor vehicle caused by collision, except the first $25.00 of each claim, which shall be paid by the Owner. In this behalf, however, it is understood and agreed that in all cases Contractor shall have the option to repair any motor vehicle which may be damaged from any cause, or to pay to Owner the value of said motor vehicle, to the extent of its book value at the time of damage.

"(d) To wash said motor vehicle once each calendar month.

"(e) To paint said motor vehicle once each year.

"(f) To recondition signs on said motor vehicle—.

"2. Contractor further agrees to furnish at its sole cost (running charges):

"(a) Gas—All, regardless of price, quantity, or location of truck.

"(b) Oil—All, regardless of price, quantity, or location of truck.

"(c) Grease—All, regardless of price, quantity or location of truck.

"(d) Tires—All, regardless of price, quantity or location of truck, and the repairs thereof.

"(e) Mechanical Repairs—All, regardless of price, quantity, or location of truck, necessary to keep and maintain the chassis in good order, serviceable and roadworthy condition.

"(f) Body Repairs—All, regardless of price, quantity or location of truck, necessary to maintain the body in good order, serviceable and roadworthy condition.

"(g) Battery, Electrical Equipment and Accessories—All, regardless of price, quantity, or location of truck, necessary to maintain said equipment in good order, serviceable and roadworthy condition.

"3. (a) To supply Owner with said motor vehicle, or a substitute therefor, 365 days of each year of the term of this contract; provided, however, that said motor vehicle shall remain in Contractor's garage for such period as may be necessary to enable Contractor to render services to the same as herein set forth, and Contractor shall not be obligated to furnish a substitute therefor during such period. However, if Contractor should require said motor vehicle for a longer period than eight successive hours, then Contractor agrees to furnish a substitute for such longer period.

"(b) To allow Owner at the termination of this contract the sum of $100.00 in trade on a new motor vehicle if Owner so desires.

"(c) To render to Owner, free of charge, reasonable service and advice of Contractor's transportation engineers in the selection of chassis and body equipment, routing of deliveries, and such other problems pertaining to transportation as may arise.

"(d) It is agreed that the Contractor has no jurisdiction over the Owner's driver but Owner agrees to instruct his driver and all other agents to observe the Contractor's reasonable rules and regulations at all times. The Owner further agrees to discharge any driver who so handles his vehicle as to cause the Contractor unnecessary expense.

"4. The Owner agrees:

"(a) To accept said motor vehicle in its then condition at the termination of this contract.

"(b) To pay Contractor for the services set forth in the 1st subdivision of this contract the sum of $55.25 per month.

"(c) To pay Contractor for the services set forth in the 2nd subdivision of this contract the sum of 14 cents for each mile said motor vehicle shall travel. * * *

"5. Owner further agrees that as the *major part of Contractor's service is the* *supplying of labor,* the Contractor shall have a mechanic's lien upon said motor vehicle and that the Contractor may hold said motor vehicle at any time during the life of this contract for any moneys due. It is further understood and agreed that such lien shall not be dependent upon the possession of said motor vehicle by Contractor. * * * [Italics added.]

"7. It is further understood and agreed * * * (c) The liability of Contractor for damage or destruction of said motor vehicle is confined to such damage or destruction as is due to a breach by Contractor of any of its express obligations herein contained. * * *"

The above quoted provisions of the contract, on careful consideration, seem to amply support the conclusion that, as stated in the contract itself, "the major part of Contractor's service is the supplying of labor."

[12, 13] Defendant calls our attention to the finding that "plaintiff is not and at no time covered by either of said contracts has been, qualified as an insurance company * * * to transact an insurance business * * * and * * * plaintiff did not at any time insure the motor vehicles, or either of them * * * against collision in or with any third party whether an authorized insurance company or otherwise." This finding is, under the circumstances shown, wholly immaterial. As to the first clause of the finding, plaintiff does not claim to be entitled to recover as a licensed insurer. As to the second clause of the finding, the fact that plaintiff failed to cause the motor vehicles to be covered by collision insurance establishes at most an immaterial (on this record) breach of its contract. There is no showing that defendant was in any wise damaged by plaintiff's failure to take out such insurance. If either truck had been damaged by collision then the liability of the plaintiff in that respect apparently would have been limited by the agreement that "The liability of Contractor for damage or destruction of said motor vehicle is confined to such damage or destruction as is due to a breach by Contractor of any of its express obligations herein contained." In view of plaintiff's express undertaking to keep the trucks in repair and operating for a stated number of miles of use, and to "make good any damage * * * caused by collision," together with its express agreement to "insure * * * [each vehicle] for Owner in an authorized insurance company" it seems probable that the breach of its obligation to maintain collision insurance would, in the event of damage by collision even though such collision was not caused by any breach of plaintiff's express obligation to maintain the vehicle in good operating condition, make plaintiff liable for the loss (without recourse insofar as insurance carried by it is concerned) but such liability would not transmute its truck maintenance business into an insurance business. Whether plaintiff's liability in such an event would be solely for damages for breach of its contract to procure and maintain collision insurance, or would arise from its obligation to "maintain" the truck, make all "necessary" repairs, and "make good any damage * * * caused by collision," notwithstanding the limiting clause above quoted, we think it unnecessary and improper for us to undertake to determine on this record. Even if we assume (we do not so decide) that plaintiff's obligation to make repairs was unlimited for the span of miles stipulated, except by the alternative to pay the owner the "book value" of his truck, that obligation would not necessarily void the contract. The making of all repairs by plaintiff—its obligation and right to make them—would be entirely compatible with the carrying of insurance with an authorized carrier to cover the cost of such repairs when the same were necessitated by some casualty such as collision or fire or flood. The making of such repairs, when covered by insurance, might well be a source of profit to plaintiff. Plaintiff's obligations (with their reciprocal contractual rights) to make repairs, to maintain the truck in good running order, and to keep a truck constantly available to the owner except for reasonable service periods, do not in our opinion, make the plaintiff an insurer. Such obligations are similar to those ordinarily undertaken by a lessor of motor vehicles and, unless we are prepared to hold that any lessor of such vehicles, en-

tering into such a contract, is in the insurance business, then we should not hold that plaintiff is, on that account, in such business. Surely the failure of a lessor of motor vehicles to carry collision insurance with an authorized insurer would not change the character of his business from automobile rental to insurance carrier.

Defendant argues, in effect, that even if the International truck contract (No. 136) be construed as not a contract of insurance, the Kleiber contract (No. 145) should be held to constitute insurance. He relies upon a certain slight difference in language in subdivision (c) of paragraph 1. The Kleiber contract, in this respect, reads as follows: "Contractor agrees * * * [1. (c)] To insure said motor vehicle for Owner in an authorized insurance company selected by Contractor as follows:

"Public liability—50/100,000.

"Property damage—We carry.

"Fire and theft—Maximum allowed by our Insurance Company.

"Collision—As under.

"Twenty-five dollars ($25.00) deductible."

[14] The words "We carry" following the subject "Property damage" differ from the International truck contract provision which specified "$5000." Defendant argues that "We carry" should be construed to mean that plaintiff thereby undertakes to carry such risk as the insurer. Plaintiff, on the other hand, asserts that such words in that contract (executed nearly two years after the International truck contract) merely mean that plaintiff was already carrying a blanket property damage insurance contract with an authorized insurance writer and agreed to continue such coverage at its own expense. We think it is obvious that plaintiff's position must be sustained. As previously mentioned, the evidence is not before us. The trial court found, as to each truck, that "plaintiff agreed * * * to cause the same to be insured" and also specifically found "That it is not true that in and by either said contract 136 or said contract 145 or otherwise or at all, plaintiff agreed to carry *as an insurer* any collision or other insurance on either of said motor vehicles. * * *" (Italics added.)

[15-17] The last quoted finding, irrespective of other considerations, appears to be determinative of this appeal. In an effort to avoid its effect defendant argues that "The fact that the respondent [plaintiff] never insured either truck against collision with any third party whether an authorized insurance company or otherwise is persuasive evidence that the respondent itself intended to carry the collision insurance." This argument as to "persuasive evidence" might have merit in the trial court but it cannot, on a judgment roll appeal, overcome a finding of fact or the construction of a contract presumptively supported by extraneous evidence. In accord with the rule previously noted we are bound to presume that competent evidence sufficient to support all findings was received without objection. (2 Cal.Jur. § 508, p. 867; id., § 514, p. 877; see, also, Freeman v. Gray-Cowan, Inc., (1933), supra, 219 Cal. 85, 88, 25 P.2d 415.) While the last quoted finding is of a conclusional fact which under certain circumstances might depend on a conclusion of law, it cannot be held to involve merely a question of law here. It is firmly established that "the appellate court will accept or adhere to the interpretation [of a writing] adopted by the trial court—and not substitute another of its own— * * * (2) where parol evidence was introduced in aid of its interpretation, and such evidence * * * is not before the appellate court." (4 Cal.Jur. 10-Yr.Supp. (1943 rev.) § 192, p. 146, and cases cited; see, also, 2 Cal. Jur. § 549, pp. 934-939; Estate of Rule (1944), 25 Cal.2d 1, 11, 152 P.2d 1003, 155 A.L.R. 1319. It is entirely unnecessary to determine what construction we might place on the contracts measured solely by their own terms in the absence of explanatory evidence. There could, of course, be evidence which would support the findings as made. We are bound to presume, as stated above, that competent evidence to that end was produced.

The judgment is affirmed.

SHENK and CARTER, JJ., and WARD, and PETERS, Justices pro tem., concurred.

EDMONDS, Justice (dissenting).

I do not agree with the conclusion that this court is bound by the findings of fact in regard to the nature and effect of the contracts in controversy. The language of the written agreements is susceptible only of a construction that they provide for insurance and it compels a finding accordingly. In clear and express terms the respondent corporation assumed the obligations of an insurer, obligations which may not be varied by parol evidence. Under these circumstances, the presumption which, upon a judgment roll appeal, ordinarily would stand in the place of substantial evidence to support the findings, may not be applied.

The statement in both contracts, "Collision—As under. Twenty-five dollars ($25.00) deductible," clearly refers to the following provision of the same section which reads: "The Contractor agrees to make good any damage done to Owner's motor vehicle caused by collision, except the first $25.00 of each claim, which shall be paid by the Owner. In this behalf, however, it is understood and agreed that in all cases Contractor shall have the option to repair any motor vehicle which may be damaged from any cause, or to pay to Owner the value of said motor vehicle, to the extent of its book value at the time of damage." This was a specific promise by the corporation to pay for damages caused by collision and it is not affected by the contractor's promise to insure the vehicles in an authorized insurance company for liability in other particulars.

The majority opinion concedes that "in view of plaintiff's express undertaking to keep the trucks in repair and operating for a stated number of miles of use, and to 'make good any damage * * * cause by collision,' together with its express agreement to 'insure * * * [each vehicle] for Owner in an authorized insurance company,' it seems probable that the breach of its obligation to maintain collision insurance would, in the event of damage by collision even though such collision was not caused by any breach of plaintiff's express obligation to maintain the vehicle in good operating condition, make plaintiff liable for the loss (without recourse insofar as insurance carried by it is concerned). * * *" Other provisions of the contract are even more explicit. For example, the contractor expressly agreed to furnish, at its sole cost and regardless of the cause of loss, all mechanical and body repairs, tires, batteries, electrical equipment and accessories. Such an obligation goes far beyond the terms of a service contract see, California Physicians' Service v. Garrison, 28 Cal.2d 790, 172 P.2d 4); it is an unequivocal agreement to indemnify the owner against all hazards, regardless of cause, incident to the ownership, maintenance, operation and use of the automobile. These provisions bring the contracts within the meaning of section 116 of the Insurance Code.

This conclusion is in accord with the weight of authority. Thus in National Auto. Service Corporation v. State, Tex. Civ.App., 55 S.W.2d 209, where an association obligated itself in consideration of certain yearly dues to pay for any damage within a stated amount to the owner's vehicle, the court held that the agreement constituted an insurance contract. An Ohio court reached the same result. In that state the contractor agreed to indemnify the owner of automobile tires against all road hazards, including damage from blow-outs, cuts and bruises, caused by defects or by collisions, whether resulting from the negligence of the owner or another. In holding the contract one of insurance, the court said: "The ultimate force and effect of the contract of indemnity embraced in this guarantee may be appreciated if extended to cover not only the automobile tire but the automobile itself. Surely no one would contend that an undertaking by an automobile manufacturer to replace an automobile damaged or destroyed * * * within a specified period after its purchase is not a contract to reimburse one if he suffers loss from a specified cause or to indemnify him against such loss." State v. Western Auto Supply Co., 134 Ohio St. 163, 16 N.E.2d 256, 259, 119 A.L.R. 1236.

In considering contracts concerning damage to plate glass, the New York courts have held that where the contractor agreed, for a stipulated consideration, to replace store windows, regardless of the cause of breakage, he was carrying on an insurance business. People v. Roschi, 275 N.Y. 26, 9 N.E.2d 763; People v. Standard Plate Glass & Salvage Co., 174 App.Div. 501, 156 N.Y.S. 1012; contra: Moresh v. O'Regan, 120 N.J.Eq. 534, 187 A. 619, reversed on other grounds 122 N.J.Eq. 388, 192 A. 831, 194 A. 156. And in Ollendorff Watch Co. v. Pink, 279 N.Y. 32, 17 N.E.2d 676, the court expressly approved the Roschli case, supra, holding that a contract of a watchmaker agreeing with the purchaser of a watch to replace the watch if lost within one year was a contract of insurance.

Whether a contract is severable or entire is a question of interpretation depending upon the intent of the parties. A severable or divisible contract is one in which two or more separate partial performances on each side are agreed to be exchanged for partial performance by one party. Thus, ordinarily where there is a contemporaneous purchase of several articles at different prices, the contract will be severable as to each of them. And where the price is, by the contract, apportioned to each agreement to be performed, the contract generally will be held to be severable.

An entire contract, on the other hand, is one in which by its terms, nature, and purpose all of the performances or parts, material provisions, and the consideration, are common each to the other and interdependent; under such circumstance, any material breach of one part justifies termination of the entire agreement by the other party. Lewis v. Shell Oil Co., 220 Cal. 80, 83, 29 P.2d 413; Law v. San Francisco Gas etc. Co., 168 Cal. 112, 116, 142 P. 52, Ann.Cas.1915D, 842; Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co., 156 Cal. 776, 779, 106 P. 55; Sterling v. Gregory, 149 Cal. 117, 120, 85 P. 305. And in the case of insurance contracts, although the above general rules are still applied, it has been said "that the question of severability of the contract * * * depends upon the nature of the risk, i.e., that, where the property is so situated that the risk on one item cannot be affected without affecting the risk on the other items, the policy must be regarded as entire * * *." Goorberg v. Western Assurance Co., 150 Cal. 510, 514, 89 P. 130, 131, 119 Am.St.Rep. 246, 11 Ann.Cas. 801, 10 L.R.A.N.S. 876.

Applying these rules to the facts of the present case it is clear that the contracts are entire. The owner agreed to pay a specified sum for garage space, license fees, washing, painting, and other services, and for the promise of the contractor to "make good any damage done to Owner's motor vehicle caused by collision." The stated sum per mile of use was to pay the contractor for all gas, oil, grease, tires, mechanical repairs, body repairs, and necessary equipment, which was to be furnished at his sole cost. The payment of these amounts, the stated sum and the fixed charge per mile, were not directly apportionable to either the service or indemnity provisions of the contracts. See: Perry v. Ayers, 159 Cal. 414, 114 P. 46; Alderson v. Houston, 154 Cal. 1, 96 P. 884. It is evident that if the contractor refused to pay for or to repair the damage to the owner's vehicle caused by collision, its failure to do so would amount to a material breach of the entire agreement, for the property is not so situated that the corporation's obligation in one particular may be repudiated without affecting the requirements as to other items.

For these reasons, in my opinion, the judgment should be reversed.

GIBSON, C. J., concurred.

Rehearing denied; GIBSON, C. J., and EDMONDS, J., dissenting.

LANE et al. v. PACIFIC GREYHOUND LINES et al. (two cases).

Civ. 13116, 13298.

District Court of Appeal, First District, Division 1, California.

Nov. 25, 1946.

Hearing Granted Jan. 23, 1947.

1. Appeal and error 🔑82(1)

To be appealable, a special order after final judgment must affect the judgment or bear some direct relation to it, and it must dispose of particular proceeding. Code Civ.Proc. § 963, subd. 2.

2. Appeal and error 🔑82(1), 870(1)

Under the maxim that the law does not favor piecemeal dispositions of appeals, a special order which does not dispose of proceeding and which is in effect merely interlocutory should be reviewed on the appeal from the order that finally disposes of the proceeding. Code Civ.Proc. § 963, subd. 2.

3. Appeal and error 🔑875

Order granting defendants' motion to be permitted to file motion to tax costs and for relief from default and order denying plaintiffs' motion to strike defendants' motion to tax costs as not timely, although merely interlocutory orders, were reviewable on appeal from order taxing costs. Code Civ.Proc. § 473; § 963, subd. 2.

4. Costs 🔑71

A failure of a litigant to claim an item of costs or a failure of his opponent to object to an item of costs, as contemplated by applicable code sections, amounts to a waiver. Rules on Appeal, rules 26, 53(b); Code Civ.Proc. §§ 1033, 1034.

5. Costs 🔑258

Petition for hearing in Supreme Court, opinions of the District Court of Appeal incorporated in such petition, and answer to petition of adversary for rehearing in Supreme Court were "briefs" within code section and rules on appeal limiting recovery for cost of printing briefs, so that, once the $100 for briefs was claimed in cost bill, costs for printing such petition, opinions, and answer could not be claimed. Rules on Appeal, rules 26, 53(b); Code Civ.Proc. §§ 1033, 1034.

See Words and Phrases, Permanent Edition, for all other definitions of "Brief".

6. Costs 🔑258

The new rules on appeal, although giving appellate courts wide discretionary powers as to division of costs on appeal, make a clear limitation as to the amount allowable as costs for printing briefs and do not make such allowances discretionary. Rules on Appeal, rules 26, 53(b).

7. Costs 🔑264

Where cost bill shows on its face that it lists certain items not recoverable and in direct violation of code section and rule on appeal, failure to file motion to tax costs within the five-day period does not constitute a waiver as to such items. Rules on Appeal, rules 26, 53(b); Code Civ.Proc. §§ 1033, 1034.

8. Costs 🔑264

A motion to tax costs is a "pleading" within meaning of code section authorizing court to relieve a party from a judgment order or other proceeding taken against him through mistake, inadvertence, surprise, or excusable neglect providing application for relief is accompanied by "pleading" proposed to be filed therein, and may properly be attached to application for relief from inadvertent failure to make a timely motion to tax costs. Code Civ.Proc. §§ 420, 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Pleading".

9. Judgment 🔑363
Motions 🔑59(2)

The grant or denial of relief from a judgment, order, or other proceeding taken against a litigant through his mistake, inadvertence, surprise, or excusable neglect is discretionary with trial court. Code Civ. Proc. § 473.

10. Judgment 🔑337
Motions 🔑59(1)

The code section authorizing court to relieve a party from a judgment order or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect is to be liberally construed to accomplish justice. Code Civ.Proc. § 473.

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* Subsequent opinion 187 P.2d 9.

11. Costs ⚷264

The inadvertent entry of a wrong date by an employee of counsel, which was the cause of a four day delay beyond time limited for filing motion to tax costs, justified court in relieving party from effect of such delay, particularly where counsel had questioned certain items within limitation period so that adversary's counsel was not misled or prejudiced by such delay. Code Civ.Proc. §§ 473, 1033, 1034.

◆

Appeal from Superior Court, Contra Costa County; Harold Jacoby, Judge.

Action by Naomi Gae Lane and others against Pacific Greyhound Lines and another for death of John Harold Lane resulting from collision between an automobile driven by plaintiffs' decedent and bus owned by named defendant. Plaintiffs' appeal secured a reversal of a judgment for defendants, 26 Cal.2d 575, 160 P.2d 21, and plaintiffs became entitled to costs on appeal. From an order granting defendants' motion for permission to file a motion to tax costs after time had expired and from an order denying plaintiffs' motion to strike defendants' motion to tax costs, plaintiffs appeal, and from an order striking certain items from plaintiffs' cross-bills, plaintiffs bring a separate appeal, which appeals were consolidated.

Orders affirmed.

F. H. Dam, of Berkeley, for appellants.

Cooley, Crowley & Supple Cooley, Crowley, Gaither & Dana, and T. H. De Lap, all of San Francisco, for respondents.

PETERS, Presiding Justice.

Plaintiffs appeal from three orders made after final judgment. Appeal No. 13,116 is from two orders made on October 25, 1945, by the trial court, one an order granting defendants' motion for leave to file a motion to tax costs on appeal and for relief from default, and the other an order denying plaintiffs' motion to strike from the files defendants' notice of motion to tax costs. Appeal No. 13,298 is from an order of the trial court made November 19, 1945, retaxing plaintiffs' costs on appeal by striking from the cost bill certain items numbered 7, 8 and 9. The last numbered appeal (13,298) was ordered consolidated with the other two appeals (13,116) by this court in order that the entire controversy over costs could be settled at one time instead of in two separate proceedings.

The present controversy is an aftermath of the case of Lane v. Pacific Greyhound Lines, 26 Cal.2d 575, 160 P.2d 21. By that opinion a judgment for defendants was reversed. By reason of such reversal plaintiffs became entitled to their costs on appeal. §§ 1033, 1034, Code Civ.Proc.; Rule 26, Rules on Appeal. The remittitur of the Supreme Court, allowing plaintiffs' costs on appeal was filed July 24, 1945. Plaintiffs served and filed their cost bill the very next day, July 25, 1945. Included within the cost bill in items 4 and 5 was $100 for the cost of printing briefs, the actual costs being in excess of that amount, but the statutes and Rules limiting the recovery of such expenditures to $100. Item 7 of the cost bill was for $50.84 for the cost of printing plaintiffs' petition for hearing in the Supreme Court; item 8 was for $66.73 for the cost of printing the opinions of the District Court of Appeal in the petition for hearing as required by the Rules; item 9 was for $31.37 for the cost of printing the answer to the petition for a rehearing in the Supreme Court.

Under §§ 1033 and 1034 of the Code of Civil Procedure a motion to tax costs must be filed within 5 days after the service and filing of the cost bill. Under these sections defendants' time to file the motion to tax expired July 30, 1945. No such motion was filed on or before that date, but on August 3, 1945, four days late, defendants filed their notice of motion to tax. On August 20, 1945, defendants filed a notice of motion, under § 473 of the Code of Civil Procedure, for permission to file a motion to tax costs and for relief from default. This motion was granted on October 25, 1945, and that is one of the orders from which plaintiffs appeal.

On August 29, 1945, plaintiffs filed a motion to strike the notice of motion filed by defendants on August 3, 1945. This motion was denied on October 25, 1945, and from such order of denial plaintiffs appeal. On November 5, 1945, according to the settled statement on appeal, the trial court, at the instance of defendants and with the consent of plaintiffs' attorneys, ordered the motion of August 3, 1945, withdrawn from the files. This would seem to render the appeal from the order denying plaintiffs' motion moot. However, the disposition made hereafter of the other two appeals makes it unnecessary to pass on that question.

On November 5, 1945, defendants' motion to tax costs came on for hearing. Various affidavits and documents were introduced and after argument the motion to tax costs was submitted. On the same day the court ordered items 7, 8 and 9 stricken from the cost bill. Plaintiffs appeal from that order, and that is appeal no. 13,298.

There is some doubt whether the two orders of October 25, 1945, are appealable orders. The plaintiffs contend that such orders were special orders made after final judgment, and are therefore appealable under § 963, sub. 2, of the Code of Civil Procedure. There can be no doubt that some orders relating to costs, at least where they finally dispose of the pending proceedings, are "special orders" after "final judgment" within the meaning of this section. Passow & Sons v. United States, etc., Co., 56 Cal.App. 72, 204 P. 545; Markart v. Zeimer, 74 Cal.App. 152, 239 P. 856; Supera v. Moreland Sales Corp., 28 Cal.App.2d 517, 82 P.2d 963; Pratt v. Robert S. Odell & Co., 63 Cal.App.2d 78, 146 P.2d 504; Hand v. Carlson, 138 Cal.App. 202, 31 P.2d 1084; Hennessy v. Superior Court, 194 Cal. 368, 228 P. 862; Contra Costa County v. Cowell Portland C. Co., 126 Cal.App. 267, 14 P.2d 606; Kellogg v. Honcutt Gold M. Co., Ltd., 25 Cal.App.2d 109, 76 P.2d 551.

[1-3] In spite of the broad language of § 963, however, it is well settled that all special orders made after final judgment are not appealable. To be appealable the special order must affect the judgment or bear some direct relation to it, and, moreover, it must dispose of the particular proceeding. See cases collected 2 Cal.Jur. p. 150, § 24. The law does not favor piecemeal dispositions of appeals. Where the special order does not dispose of the proceeding, and where it is in effect merely interlocutory, it should not be appealable but should be reviewed on the appeal from the order that finally disposes of the proceeding. In the present case the order granting defendants' motion to be permitted to file their motion to tax and for relief from default under § 473 of the Code of Civil Procedure, and the order denying plaintiffs' motion to strike, both contemplated that a further order on the motion to tax costs would be made. Obviously, if the court had denied defendants' motion to tax costs on its merits plaintiffs would not have been injured and their appeals from the two prior orders would have been unnecessary. The first two orders here appealed from were nothing but interlocutory orders that not only did not finally dispose of anything but also did not injure plaintiffs until the trial court passed on defendants' motion to tax costs and disallowed certain items. For these reasons it might well be held that the first two orders here appealed from were not appealable. However, we do not find it necessary to so hold because if not appealable they would be reviewable on the appeal from the order taxing costs.

The major contentions of plaintiffs are that the failure of defendants to file their motion to tax costs within the five days constituted an absolute waiver of any objections to the tax bill, that the court was without power to grant relief from default under § 473 of the Code of Civil Procedure, and that, in any event, the questioned items were recoverable. None of these contentions are sound.

Section 1034 of the Code of Civil Procedure provides in part: "Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must, within thirty days after the remittitur is filed with the clerk below, serve upon the adverse party and file with such clerk a memorandum of his costs, verified as prescribed by the preceding section. The party dissatisfied with the costs claimed may move to have the same taxed in the same manner and within a like time after service of a copy of the bill of costs, as prescribed by the preceding section. After such costs have been taxed, or the time for taxing the same has expired, execution may issue therefor as upon a judgment."

Section 1033 provides in part: "A party dissatisfied with the costs claimed may, within five (5) days after the service of a copy of the bill of costs, file a motion to have the same taxed by the court in which the judgment was rendered, or by the judge or justice thereof at chambers."

[4] Under these sections a failure to claim an item of costs, or the failure to object to an item of costs contemplated within the code sections, amounts to a waiver. See cases collected 7 Cal. Jur. p. 295, § 35. But the difficulty with plaintiffs' argument is that in the present case the cost bill on its face, in items 7, 8 and 9, claimed as costs items directly prohibited by law. Section 1034 read, at the time the cost bill was filed herein, that is, on July 25, 1945, as follows: "The prevailing party on appeal shall be entitled to his costs * * *. The party entitled to costs, or to whom costs are awarded, may recover all amounts actually paid out by him in connection with said appeal, and the preparation of the record for the appeal * * * the costs of printing briefs, and the production of additional evidence; *provided, however, that no amount shall be allowed as costs of printing briefs in excess of one hundred dollars to any one party.*" (Italics added.)

Rule 26 of the Rules on Appeal, effective July 1, 1943 (Rule 53(b), in sub. c. provides in part: "The party to whom costs are awarded may recover only the following, when actually incurred: * * * (2) the cost of printing or other reproduction of briefs, not exceeding $100 to any one party."

[5, 6] In items 4 and 5 of the cost bill the plaintiffs claimed their $100 allowed for the printing of briefs. Then in items 7, 8 and 9 plaintiffs claimed further allowances for printing documents which undoubtedly are "briefs" within the meaning of the code section and rule. This was definitely settled in the case of Haydel v. Morton, 18 Cal.App.2d 695, 696, 64 P.2d 954, 955, where it was held: "The defendant was allowed the statutory amount for printing his briefs on appeal. He claimed the additional amount of $73.28 as the cost of printing his reply to plaintiff's petition for a hearing by the Supreme Court. As provided by statute, an allowance for printing briefs is limited to the sum of $100. Code Civ.Proc., § 1034, * * *. Petitions for rehearings by the District Court of Appeal or for hearings by the Supreme Court, and replies thereto, are but statements of the propositions which are desired to be established, and are essentially briefs. Bell v. Germain, 12 Cal.App. 375, 107 P. 630; 9 Cor.Jur. 499. Such being the case, they come fairly within the meaning of the statute, and allowance therefor should be limited accordingly." Incidentally, the attorney for the plaintiffs in the present case was also one of the attorneys for the party who succeeded in convincing the appellate court in the Haydel case that such documents fell within the classification of briefs. He now argues that the Haydel case was decided before the new Rules on Appeal were adopted and that the new Rules make such allowances discretionary with the trial court. His contention is without merit. While the new Rules give the appellate courts wide discretionary powers as to the division of costs on appeal, the $100 limitation is just as clear, and applies to exactly the same documents, as did the old Rules and statutes. This is clearly pointed out by the draftsman of the Rules in his article in 17 So.Cal.L.Rev. 232, where, at p. 258, it is stated in reference to Rule 26: "Considerable debate took place over the $100 limit in § 1034 on the allowable award for the cost of briefs. It was urged that the limit be removed, or at least raised, or that an additional allowance be given to cover the cost of petitions for rehearing and hearing and answers thereto, but no sufficiently strong sentiment on the part of the Bar appeared to favor such changes." While the allowance of $100 for briefs, under present high printing costs, seems quite small, the allowance, if it is to be raised, must be done by the Judicial Council or the Legislature.

[7] Thus, in this case the cost bill showed on its face that it listed certain items not recoverable and in direct violation of § 1034 of the Code of Civil Procedure and Rule 26. As to such items the rule is that failure to file the motion to tax costs within the five-day period does not constitute a waiver. The waiver only extends to those items included within § 1034 of the Code of Civil Procedure. Where the prevailing party lists items not included within that section or in direct violation of the section, he should not be permitted to claim a waiver in reliance on the section. That was the holding in Hansen v. Farmers A. Inter-Ins. Exch., 12 Cal.App.2d 493, 55 P.2d 900, and the rule of that case is sound. If that is so, then it was unnecessary for defendants to have moved for relief under § 473 of the Code of Civil Procedure.

Independently of whether there was or was not a waiver the court had power under § 473 to grant defendants relief from their default. Plaintiffs strenuously argue that § 473 has no application to a motion to tax costs for the reason that such a motion is not a pleading. Section 473 provides that a court may relieve a party "From a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted."

[8] The plaintiffs argue that since a "pleading" is required to accompany the application, and since a cost bill is merely a notice (Beilby v. Superior Court, 138 Cal. 51, 70 P. 1024), that a notice of motion to tax costs is merely a notice and not a pleading, and § 473 cannot apply. In the present case there was annexed to the motion for relief a copy of the proposed motion to tax and an affidavit in support of the motion for relief. Section 420 of the Code of Civil Procedure defines "pleadings" as "The formal allegations by the parties of their respective claims and defenses, for the judgment of the court." Certainly the present case falls within the letter and spirit of that section. To hold otherwise would unduly limit § 473 in direct violation of the obvious beneficent purposes of that section. This conclusion is supported by both reason and authority. It has been directly held in Soda v. Marriott, 130 Cal. App. 589, 20 P.2d 758; Potter v. City of Compton, 15 Cal.App.2d 238, 59 P.2d 540, and Kallmeyer v. Poore, 52 Cal.App.2d 142, 125 P.2d 924 (hearing denied), that the court has power and jurisdiction to grant relief under § 473 for the failure of the prevailing party to file his tax bill within the statutory time. If failure to file the tax bill within time falls within § 473, then, of course, failure to file the motion to tax costs likewise falls within the section. Plaintiffs recognize that these cases are contrary to their contentions but urge that these three cases are wrong. The cases they cite to establish a contrary principle are not in point, and do not stand for the proposition for which they are cited.

The plaintiffs also urge that since § 1034 of the Code of Civil Procedure provided, referring to costs, that after "The time for taxing the same has expired, execution may issue therefor as upon a judgment," that because of the use of the word "expired" no revival is permissible under § 473. Whatever the rule may be as to items of costs falling within § 1034, the rule can have no application to items requested in direct violation of the statute.

[9-11] The last point urged is that the facts shown in support of the request for relief were not sufficient. The point needs but little consideration. It is well settled that the granting or denying of relief under § 473 is a matter resting primarily within the discretion of the trial court (Soda v. Marriott, 130 Cal.App. 589, 20 P.2d 758; Berri v. Rogero, 168 Cal. 736, 145 P. 95; Dineen v. San Francisco, 38 Cal.App.2d 486, 101 P.2d 736), and that the section is to be liberally construed to accomplish justice. Haviland v. Southern California Edison Co., 172 Cal. 601, 158 P. 328; Manning v. Gavin, 14 Cal.2d 44, 92 P.2d 795. Here the affidavits showed that the inadvertent entry of a wrong date by an employee was the cause of the four-day delay. The record also shows that by letter within the five days counsel for defendants had questioned the items here involved, so that

plaintiffs' counsel was not misled or prejudiced by the four-day delay. While it has been held that relief under § 473 would not be granted where it was merely based on the press of other business and forgetfulness on the part of the attorney, it has been held that the inadvertent entry of an erroneous date in the journal of proceedings kept by the defaulting attorney justifies an order relieving from default under the section. Haviland v. Southern California Edison Co., 172 Cal. 601, 158 P. 328; Manning v. Gavin, 14 Cal.2d 44, 92 P.2d 795; Hagenkamp v. Equitable L. Assur. Soc., 29 Cal.App. 713, 156 P. 520; Melde v. Reynolds, 129 Cal. 308, 61 P. 932. This case falls within the rule of those cases.

The three orders appealed from are affirmed.

WARD, J., and SCHOTTKY, Justice pro tem., concur.

77 Cal.App.2d 199

MOORE et al. v. WIMMER.

WIMMER v. MOORE et al.

Civ. 3519, 3520.

District Court of Appeal, Fourth District, California.

Dec. 9, 1946.

1. Appeal and error 🔑1071(2)

Whether trust agreement providing for repayment out of profits of money advanced to purchase business and subsequent division of profits between mortgagor and mortgagees was superseded or suspended by chattel mortgage on assets of business subsequently given to secure repayment of money advanced under trust agreement was immaterial in action to foreclose mortgagor's interest in business, where alleged violations relied on as ground for foreclosure would constitute violations of both mortgage and trust agreement, and ten days' notice specifying violations required by trust agreement as prerequisite to action to terminate mortgagor's interest was not given and no waiver or estoppel existed in such connection.

2. Chattel mortgages 🔑278

Evidence sustained findings that mortgagor had not violated any provisions of chattel mortgage on assets of business so as to warrant forfeiture of his interest in the business.

3. Appeal and error 🔑1058(1)

In action to foreclose chattel mortgage on assets of business for alleged violation of mortgage provisions by mortgagor, exclusion of evidence of alleged violations which occurred after action was commenced was not prejudicial, where most of such evidence was merely cumulative.

4. Chattel mortgages 🔑251

The right given by chattel mortgage to foreclose if for any reason mortgagee feels insecure is not an arbitrary right and exercise thereof must be based upon reasonable grounds.

5. Chattel mortgages 🔑251

Mortgagees were not entitled to foreclosure of chattel mortgage on assets of business under mortgage provision permitting foreclosure should mortgagees feel insecure, where no change had taken place since execution of mortgage, business was prospering, all required payments had been made, and there was nothing to indicate that existing situation would not continue.

6. Chattel mortgages 🔑282, 283

Finding that if any violations of chattel mortgage on assets of business occurred, they were insufficient to justify forfeiture of mortgagor's rights was not in fatal conflict with other findings that no such violations occurred and either finding was sufficient to support judgment refusing to foreclose the mortgage.

7. Appeal and error 🔑1043(4)
Chattel mortgages 🔑281

Where no reason existed for foreclosure of chattel mortgage on assets of business, trial court did not abuse its discretion in discharging receiver and no prejudice could result from such discharge before judgment became final, where receivership was continued under a stay bond pending appeal.

8. Trusts ⚷72

Where mortgagor with funds advanced by holders of mortgage on assets of business purchased a truck to be used in the business and took title thereto in his own name, a trust resulted in favor of mortgagees.

9. Chattel mortgages ⚷172(5, 9)

Evidence that mortgagor with funds advanced by holders of chattel mortgage on assets of business purchased a truck for use in the business and took title thereto in his own name did not support findings that mortgagor was owner of truck and that it was not purchased as part of the business and mortgagor had not agreed to hold it in trust pursuant to terms of trust agreement or mortgage, but neither of such findings was essential to judgment in action in claim and delivery awarding possession of truck to mortgagor on ground that mortgagees unlawfully seized it without right.

10. Chattel mortgages ⚷172(9)

The ultimate ownership of truck purchased by mortgagor with funds advanced by holders of chattel mortgage on assets of business dependent upon subsequent events and could not be determined in mortgagor's action in claim and delivery to recover possession of truck from mortgagees who allegedly seized it unlawfully, and hence unsupported findings as to ownership of truck should be stricken.

◆

Appeals from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Harry E. Moore and another, transacting business under the fictitious name and style of Mor-Mel Company, against Charles W. Wimmer to have defendant's interest in a cafe and cocktail lounge business declared forfeited, a receiver appointed and possession of business awarded to plaintiffs, and action in claim and delivery by Charles W. Wimmer against Harry E. Moore and another, individually, and as copartners doing business under the fictitious name and style of Mor-Mel Company, to recover possession or the value of a motor truck. The actions were consolidated for trial and from judgments denying plaintiffs in first action any relief, and awarding plaintiff in second action possession or value of truck, and from an order discharging the receiver, plaintiffs in first action, being defendants in second action, appeal.

Judgments and order affirmed.

Calvin H. Conron, Jr., and Allan B. Campbell, both of Bakersfield, for appellants.

Frederick E. Hoar, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

On December 11, 1944, the appellants advanced $15,000 to the respondent to enable him to purchase a cafe and cocktail lounge at Randsburg. He purchased this business for $12,050.00, and on the next day the parties executed a trust agreement in which it was provided: that this respondent should devote his entire time to this business and put forth his best efforts to the end that it should be conducted efficiently and in compliance with all laws; that he should deposit all receipts in a separate bank account which should be subject to the inspection of the appellants; that he should keep a double entry set of books showing all transactions, and submit quarterly statements to the appellants; that he should be paid $75 a week for his services, to be accounted for as an expense of the business; that the entire profits should be paid to the appellants until their advances, with cost and expenses, were repaid with interest; and that, thereafter, the profits should be divided, one-half to the appellants and one-half to the respondent.

It was further provided that if the business should be sold the proceeds should be applied in a similar manner; that in the event the advances were not repaid within four years the business should be liquidated; that after repayment of the advances the respondent should own a one-half interest in said business; and that if he should violate the terms of the agreement for a period of ten days after receipt of a written notice "specifying such violation and damanding its correction", the appellants might maintain an action to terminate the trust and to declare a forfeiture of his interest in the business.

Shortly thereafter the respondent applied for a liquor license in connection with this business, and one was issued to him individually. About the same time, with the consent of the appellants, the respondent used $1250 of the $15,000 advanced to pay off certain judgments against himself personally, and also used about the same amount to purchase a light truck which it was agreed was needed in connection with the operation of this business.

On January 10, 1945, the appellants advanced an additional $3000 to the respondent and he gave them a note for $18,000, payable in monthly installments of $250 or more. On January 12, 1945, the respondent, at the request of the appellants and for the expressed purpose of giving them better security, executed and delivered to them a chattel mortgage covering the lease, the furniture and fixtures, the stock in trade, and all licenses. This mortgage recited that it was given to secure the repayment to the appellants of $15,000 to be paid in monthly installments of $250 or more each month, commencing February 1, 1945, until the entire sum, with interest at 5% per annum on the deferred balance, should be paid. The respondent therein agreed not to sell this business or any of the mortgaged articles, except in the ordinary course of business, to pay all bills when due, and to conduct the business in accordance with all laws applicable thereto. It was then provided that the appellants might foreclose in the event the respondent failed to make any of the monthly payments, if he breached any provision of the mortgage, or "if for any reason mortgagee feels insecure." The final provision of this mortgage reads as follows: "Upon the repayment of this mortgage, Mortgagor agrees to hold said property thereafter pursuant to the provisions of a Trust Agreement between the parties hereto."

The place was opened for business on the day the mortgage was given. The monthly payments therein called for were made on February 1, March 1, and also on April 1, 1945, the latter payment being made after suit was filed but before a receiver was appointed.

On or about March 21, 1945, the appellants told the respondent that they were through with him because he had "been drunk all the time and neglected the business." They then, in respondent's absence, took money and records from the place of business, changed the combination of the safe, and arranged to have the head barkeeper cooperate with them. On March 27, 1945, the appellants brought the first of these actions. The complaint alleged that the respondent had violated the terms of the trust agreement by failing to devote his entire time to the business, by consuming alcoholic liquor to excess, by employing incompetent employees and discharging competent employees, by violating the law in permitting liquor to be sold to minors, by failing to keep proper books and failing to deposit receipts in a separate bank account, by withdrawing more than $75 per week, and by failing to apply the profits of the business to the repayment of the advances made. It was further alleged that the respondent had fraudulently induced the appellants to refrain from giving a 10-day notice, as called for in the trust agreement, by orally admitting that he had violated that agreement and promising that he would, within five days, either repay the $18,000 or surrender possession of the premises. In a second cause of action it was alleged that the respondent had violated the terms of the chattel mortgage by failing to keep up the stock in trade, by removing assets of the business, by failing to pay taxes, and by failing to conduct the business in accordance with law; and that these appellants "feel insecure" by reason of these defaults. The prayer was that a receiver be appointed, that the interest of the respondent in this business be declared forfeited, and that these appellants be awarded the possession thereof. A receiver was appointed on April 21, 1945.

When service of summons was made on March 27, 1945, the appellants also took possession of the truck above referred to. Shortly thereafter, the respondent filed an action in claim and delivery seeking to recover the possession of this truck, or its value in case delivery could not be had. The two actions were consolidated for trial, and are presented together on this appeal.

The court found in all respects in favor of the respondent. In brief, it was found that the respondent had not violated any of the provisions of the trust agreement. A finding in his favor was specifically made with respect to each violation of that agreement charged in the complaint. It was further found that no 10-day notice had been given to the respondent, as required by the trust agreement, and that no promise or other act on the part of the respondent had misled the appellants or induced them to refrain from giving such a notice. With respect to the chattel mortgage, it was found that the respondent had not violated any of its provisions and specific findings in his favor were made as to all such charges contained in the complaint. With respect to the other action, for the possession of the truck, it was found that on March 27, 1945, these appellants took possession of the truck believing that they had a right to do so, that they acted in good faith but were in error in so doing, and that their action in taking the truck was unlawful and without any right. Separate judgments were entered denying these appellants any relief in the first action, and awarding the respondent possession of the truck in question, or its value in case delivery could not be had. The plaintiffs in the first action, being the defendants in the second action, have appealed from both judgments and from a subsequent order discharging the receiver. The receiver, however, has remained in possession of the property under a stay bond.

[1] It is first contended that the court committed prejudicial error in failing to construe the trust agreement and the chattel mortgage as one agreement, and in holding that the chattel mortgage was given and accepted for the purpose of "superseding" the prior trust agreement. Until the advances were repaid, a very considerable change was made by the chattel mortgage both expressly and by necessary implication. The changes thus made and the final provision of the mortgage, that upon its repayment the respondent would thereafter hold the property under the provisions of the trust agreement, indicate an intention to supersede some of the provisions of the prior agreement, and to suspend the operation of at least some of the others. Whether the prior agreement be regarded as superseded or as suspended, in whole or in part, is immaterial in this action. No prejudice could have resulted. Most of the violations claimed, if established, would also constitute violations of the provisions of the chattel mortgage. And even if the trust agreement was not superseded the others could not be relied upon as the 10-day notice required by the trust agreement was not given and it was found, upon sufficient evidence, that no waiver or estoppel existed in that connection. The contention that prejudice appears because this holding has the effect of destroying the appellants' interest in this business, after the mortgage debt is paid, is without merit. The mortgage itself provides that when the debt is paid the property is then to be held pursuant to the provisions of the trust agreement. The controlling question here is as to whether or not the provisions of this chattel mortgage were so violated as to require a foreclosure of the respondent's interest in this business.

It is next urged that the court's findings that the respondent had not violated the provisions of this mortgage, and that he had not been guilty of the particular acts with which he was charged, are not supported by the evidence. It is argued that the undisputed evidence discloses four such violations on the part of the respondent: (1) that he violated the law in that he at no time maintained a restaurant as required by the Alcoholic Beverage Act; (2) that he violated the law in willfully refusing to file sales tax and Social Security reports; (3) that he violated the labor law in failing to pay his help periodically; (4) and that he failed to pay interest on the balance of the mortgage obligation, paying only the monthly payments of $250. The first of these charges seems to have been an after-thought as no serious effort was made to establish such a fact at the trial. While it was incidentally brought out that the installation of a certain lunch counter was not completed before suit was filed, we can find no evidence that there was no sufficient serving of food to comply with the law. On the other hand, there is considerable evidence that food was served during the time in question. The second charge relates to a delay in filing these reports in the month of April, after this suit was brought. It does not appear whether it occurred after a receiver was appointed or while the application for a receiver was pending. It does appear that the delay was caused by the fact that the attorney for the respondent was in doubt as to who should make the reports, and the reports were actually filed by the receiver. As to the third charge, it appears that one of the barkeepers did not want his pay regularly and, at his request, the respondent deposited checks to the barkeeper's account in a bank at Bakersfield on the occasions when the respondent went to that city. The fourth charge of violation is without merit. Under the terms of the mortgage no payment of interest was required before this action was brought.

In this connection, but under another heading, it is argued that these findings are contrary to the undisputed evidence, it being stated that the respondent in his own testimony admitted (a) that he was intoxicated on several occasions; (b) that he never operated a cafe; (c) that he failed to keep books; and (d) that he failed to pay wages when due. While the respondent admitted that he might have used liquor to excess "a couple of times", he did not admit that this occurred in such a manner as might have interfered with his conduct of the business, and there is a great deal of evidence to the contrary. With respect to the other three claimed admissions, the references made to the transcript show that the statements relied on were made by other witnesses, and we can find no such admissions in the respondent's testimony.

It may be further observed, with respect to the matter of bookkeeping, that it appears from the evidence that at the beginning of operations the respondent, at the request of the appellants, employed a bookkeeper in Bakersfield who was selected by them, that he kept daily records which were placed in envelopes as directed by the bookkeeper, that he took or sent these records to the bookkeeper, and that any deficiency in the books was due to the acts of the bookkeeper and to the acts of the appellants after they began to interfere in the conduct of the business.

[2] While portions of the evidence would have supported findings that the terms of the mortgage were violated in certain respects, there is evidence to the contrary which supports the findings made and nothing more than a conflict appears in this connection.

It is next contended that the court erred in excluding evidence of matters which occurred subsequent to the filing of this action. Most of the evidence thus excluded related to claimed intoxication on the part of the respondent, and most of this related to a time after a receiver was appointed. Some of it related to the first three weeks of April, when the respondent was still nominally in charge, although the appellants were then largely controlling the conduct of the business through the head barkeeper. Offers of proof made in this connection were insufficient in that they did not cover all of the elements necessary to show a neglect of the business or an adverse effect upon the business. In another instance, the proof offered would have shown that a few days before the receiver was appointed the respondent closed the business for one day. Other elements enter into that occurrence, including interference in the business by the appellants and their agents. Another offer of proof was made in connection with the conviction of a temporary barkeeper for selling liquor to a minor. The offer of proof was insufficient, and the matter was gone into at another time showing that the respondent had had nothing to do with the incident.

[3] If it could be considered, under any theory, that evidence of any such subsequent acts were admissible it cannot be held, under the circumstances here appearing, that the rejection of this evidence was prejudicial. Most of this matter was cumulative and there was considerable evidence on both sides along this line. The main part of the rejected evidence had already been presented to the same judge, in affidavits in connection with the appointment of a receiver, and he was familiar with it. In view of all of the evidence in the record it cannot be assumed that any of this evidence, if formally admitted, would have changed the trial judge's mind or have affected the result. In any event, the subsequent acts of the respondent should be considered in the light of what the appellants had done. The evidence, as a whole, justifies the inference that in attempting to terminate this relationship so soon the appellants were actuated by a motive other than any of those now relied on.

[4, 5] It is next contended that even on the findings made the appellants were entitled to judgment since the mortgage provided that it might be foreclosed "if for any reason mortgagee feels insecure." The right thus given is not an arbitrary one but is one the exercise of which must be based upon reasonable grounds. Rochon v. Pacific Coast Mortg. Co., 111 Cal.App. 298, 295 P. 364. As found by the court, no change had here taken place between the execution of the mortgage and the filing of suit, upon which a feeling of insecurity could reasonably be based. It appears that the business was prospering at the time the appellants took action and that the receipts of the business had very greatly increased during the last month in which the respondent was in disputed possession. All required payments had been made, and there was nothing to indicate that the existing situation would not continue. No objection had been raised, and no request or complaint had been made until appellants were ready to act. No error appears in this respect.

[6] The next point raised is that the findings are conflicting and, therefore, do not support the judgment. It is argued that findings that any breaches or violations of the chattel mortgage "if such did occur, were of minor, inconsequential and unsubstantial nature and wholly insufficient to justify forfeiture of defendants' rights herein"; that the personal habits and characteristics of the respondent were and had been personally known to the appellants for many years; and that no change therein occurred to their detriment between the execution of this mortgage and the commencement of this action that would warrant a declaration of forfeiture or "reasonably warrant plaintiffs to feel insecure", are in conflict with other findings to the effect that no violations occurred. Some of the evidence supports the findings that there were no violations and some of the evidence would support findings that there were minor violations which were not sufficient, in equity, to justify a forfeiture or foreclosure. A finding that there were violations which were inconsequential and unsubstantial would, in practical effect, be a finding that in a legal sense there was no violation. There was no positive finding to that effect here, the finding being that if any breaches or violations did occur they were inconsequential and unsubstantial in nature. Under any view, both findings are supported by the evidence and either is sufficient to support the judgment in such an equitable action. No fatal conflict in this regard appears.

[7] The last point raised, with respect to the first action, is that the receiver should not have been discharged until the judgment became final. This is sufficiently answered by what we have already said, by the fact that no abuse of discretion appears (Wiencke v. Bibby, 15 Cal.App. 50, 113 P. 876; Sly v. Superior Court of California in and for Los Angeles County, 71

Cal.App. 290, 235 P. 83) and by the fact that no prejudice appears because the receiver has been continued under a stay bond.

[8-10] With respect to the second action, for the possession of the truck purchased for use in connection with this business, the appellants contend that two findings are not supported by the evidence. In the first of these, it was found that the respondent "was the owner of and entitled to the immediate possession of" this truck. In the second, it was found that it is not true that this truck was purchased by the respondent as a part of this business, or that the respondent agreed to hold the same in trust pursuant to the terms of the trust agreement, or pursuant to the provisions of the chattel mortgage. The undisputed evidence shows that this truck was purchased with funds advanced by the appellants and for the purpose of being used in this business. There was, therefore, a resulting trust in favor of the appellants. Goes v. Perry, 18 Cal.2d 373, 115 P.2d 441. The finding that the respondent was the owner of the truck is not supported by the evidence. The other finding referred to is also without such support. However, neither of these unsupported findings of fact is essential to the judgment, which was merely that the respondent recovered the possession of the truck. The truck has already been turned over to the receiver and should be considered as one of the assets of the business. The ultimate ownership of the truck will depend upon subsequent events and should not be, and cannot be, determined in this action the portions of the findings which are thus unsupported should be stricken with that end and purpose in mind. This will require no modification of the judgment, which correctly awarded possession of the truck to the respondent.

The words "the owner of and" appearing in Finding II and all of Finding VI are ordered stricken. The two judgments and the order appealed from are affirmed.

MARKS and GRIFFIN, JJ., concur.

MUDD v. McCOLGAN (five cases). *

Civ. 15320.

District Court of Appeal, Second District, Division 1, California.

Nov. 27, 1946.

Hearing Granted Jan. 23, 1947.

1. Taxation 🔑362

The time provided for assertion of State Franchise Tax Commissioner's right to collect a deficiency income tax in statute requiring a proposed deficiency tax to be mailed to taxpayer within three years after the return was filed was a "condition precedent" of the right, and not a "statute of limitations", and, hence, the right was lost unless seasonably enforced. St.1939, p. 2557, § 19.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent" and "Statute of Limitations".

2. Statutes 🔑209

A word used in one place in a statute is deemed to be used in the same sense throughout that statute unless a different meaning is indicated.

3. Taxation 🔑327

The determination of a deficiency in income tax for tax year 1936 in 1940 by State Franchise Tax Commissioner was a "computation" of a tax, within provision in amendatory act that 1939 amendments to personal income tax act should be applied only in "computation" of taxes accruing subsequent to December 31, 1938, and, hence, provision in amendatory act extending time for mailing a proposed deficiency tax to taxpayer from 3 to 4 years was not applicable so as to make Commissioner's determination timely. St.1939, pp. 2557, 2566, §§ 19, 23.

See Words and Phrases, Permanent Edition, for all other definitions of "Computation".

4. Statutes 🔑176

The power of courts to interpret statutes does not include the power to rewrite a statute to accord with a presumed legislative intent.

* Subsequent opinion 183 P.2d 10.

5. Statutes ⚷219

The interpretation of a statute by administrative agency, or its legal advisor, will be accorded great respect by the courts and, if not clearly erroneous, will be followed by the courts, but if erroneous, such construction will be overthrown where such a question of law is properly presented.

6. Constitutional law ⚷77

The clear meaning of a statute cannot be altered by administrative construction.

7. Statutes ⚷219

Fact that attorney general had specifically ruled that 1939 amendment to personal income tax act extending from 3 to 4 years the time within which deficiency assessments could be proposed was applicable to deficiencies for taxable years ending prior to December 31, 1938, so long as the right to issue such deficiencies was not barred on effective date of the amendment, though entitled to weight, would not require court to uphold such construction if it determined that such ruling was erroneous. St.1939, pp. 2557, 2566, §§ 19, 23.

8. Limitation of actions ⚷41

The doctrine of "equitable recoupment" allows defendant to offset against plaintiff's claim a debt of plaintiff to defendant that in equity should be paid, although the time within which the defendant might initiate an action to enforce such debt may have expired. Code Civ.Proc. § 438.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Recoupment".

9. Pleading ⚷143

A defense of "equitable recoupment", which is one species of set-off, is an "affirmative defense" and must be separately pleaded. Code Civ.Proc. §§ 437, 438, 439.

See Words and Phrases, Permanent Edition, for all other definitions of "Affirmative Defense".

10. Taxation ⚷543(7)

Where State Franchise Tax Commissioner was without authority to make deficiency income tax assessments in any amount against plaintiffs at time he attempted to do so because of failure to comply with statute requiring proposed deficiency tax to be mailed to taxpayer within three years after return was filed, plaintiffs, in seeking to recover taxes paid pursuant to the deficiency assessments, were not relying on doctrine of equitable recoupment, and, hence, they were not required to show that they had paid more taxes than in equity should have been paid. St.1939, p. 2557, § 19.

◆

Appeals from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Consolidated actions by Harvey S. Mudd, as trustee, Mildred E. Mudd, Dorothy D. Mudd, and Seeley G. Mudd, against Charles J. McColgan, Franchise Tax Commissioner of the State of California, for a refund of income taxes paid by the respective plaintiffs to the defendant pursuant to deficiency assessment in 1940 applicable to the tax year 1936. From a judgment for defendant in each case, the plaintiffs appeal.

Judgments reversed, with directions.

Boyle, Holmes, Fry & Garrett, of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., John L. Nourse, Deputy Atty. Gen., and Daniel N. Stevens, Deputy Atty. Gen., for respondent.

WHITE, Justice.

The five cases embraced in this appeal were consolidated for trial by order of court. The pleadings and essential facts are the same in all. In the five cases refund is sought of income taxes paid by the respective plaintiffs to the defendant pursuant to deficiency assessments in 1940 applicable to the tax year 1936. In each case the assessment was made more than three years after the taxpayer had filed his tax return.

It is appellants' contention that an indispensable statutory condition to the assessment of such a deficiency was the giving by respondent of notice of his intention so to do within three years after the filing of the taxpayer's return. Respondent contends that he was entitled to give such notice within four years after the filing of the return.

On April 15, 1937, each appellant filed his California Personal Income Tax Return showing his taxable net income for the calendar year 1936. Contemporaneously therewith, the tax calculated by the taxpayer to be due was paid by him to the respondent. It is alleged in the complaints that the amount so paid constitutes the total tax due under the Personal Income Tax Act for said year.

In August and December, 1940, respondent mailed the respective appellants a Notice of Additional Personal Income Tax proposed to be assessed, wherein it was recited that respondent proposed to assess an additional tax under said Act for the year 1936. It is conceded that in all cases said notice was mailed more than three years after the filing of appellants' tax return as aforesaid.

After due protest by each of the appellants against the proposed deficiency assessments, respondent, in each instance, levied an additional tax which was paid. Appellants then filed their respective claims for refund of the amount of said additional tax, which claims were denied. To recover the amount of said additional tax, appellants instituted the actions now before us. In each case judgment was for respondent. From such judgments appellants prosecute this appeal.

The Personal Income Tax Act of 1935 (Stats.1935, p. 1090, Deering's Gen.Laws, Act 8494) imposed a graduated tax on the net income of individuals. It required all persons affected by it to file an annual return showing their gross income, as well as deductions and credits allowed by the Act.

Section 19 of the Act provided: "As soon as practicable after the return is filed, the commissioner shall examine it and shall determine the correct amount of the tax. If the commissioner determines that the tax disclosed by the original return is less than the tax disclosed by his examination he shall mail notice to the taxpayer at his last known address of the deficiency proposed to be assessed. The notice shall set forth the details and computation of such deficiency."

It is further provided in section 19 that: "Except in the case of a fraudulent return, every notice of a proposed deficiency tax shall be mailed to the taxpayer within *four* years after the return was filed and no deficiency shall be assessed or collected with respect to the year for which such return was filed unless such notice is mailed within such period." (Emphasis added.)

The foregoing was the law when in 1937 appellants filed their respective returns of 1936 income and paid their taxes thereon.

The Act was extensively amended by the legislature in 1939 (Stats.1939, Ch. 915). Included in the amendments was a substitution of the word "four" in place of the word "three" in the sentence last above quoted from section 19. In other words, the statute, as amended gave respondent commissioner four instead of three years after filing of returns within which to mail notices of proposed deficiency tax.

The aforesaid amendatory statute of 1939 took effect July 22, 1939. In section 23 of the Act it was provided that: "This act, inasmuch as it provides for a tax levy for the usual current expenses of the State, shall, under the provisions of section 1 of Article IV of the Constitution, take effect immediately, *and shall be applied in the computation of taxes accruing subsequent to December 31, 1938.*" (Emphasis added.)

By their complaints herein, appellants, in the first counts thereof, alleged that the deficiency tax assessed by respondent against them was illegally and erroneously assessed and collected and, is therefore void.

In the second counts of their complaints, appellants adopt all of the averments of the first counts as a ground of invalidity of the tax, and specifically plead the failure of respondent commissioner to give notice of the proposed deficiency tax within three years after the filing of the respective returns.

Upon this appeal it is the position of appellants that:

"(1) Respondent commissioner was expressly forbidden by statute to assess a deficiency tax without first having given notice of his proposal so to do within three years after the filing of the return.

"(2) If there be any doubt as to the defendant's authority to assess the deficiency, said doubt must be resolved in favor of appellants."

The first of these contentions is grounded on the claim that appellants' returns filed April 15, 1937, were for the year 1936, at which time and until July 22, 1939, section 19 of the statute allowed respondent commissioner *three* years after such filing of the returns within which to give notice to the taxpayer of a proposed deficiency assessment. The notice of proposed deficiency in each of the cases now before us was not mailed by respondent commissioner for more than three years after the filing of the returns.

In further support of their position, appellants assert that the amendatory statute, effective July 22, 1939, extending the period from three to four years, specifically provided in section 23 thereof that "This act * * * shall be applied in the computation of taxes occurring subsequent to December 31, 1938."

Contrary to appellants' contentions, respondent asserts that, because the period within which the commissioner could issue notices of proposed deficiencies was extended from three to four years by the amendment effective July 22, 1939, and since the deficiencies here in question were not proposed until August and December, 1940, respondent commissioner has not attempted to apply the 1939 amendment to deficiencies assessed prior to its effective date. In other words, respondent commissioner urges that at the time appellants filed their tax returns on April 15, 1937, for the taxable year 1936, the law then in effect provided that the commissioner could issue a deficiency assessment with respect to the taxable year (1936) at any time before April 15, 1940 or within three years after filing of the returns (April 15, 1937). That the 1939 amendment extending the period for mailing notice of proposed deficiencies from three to four years, being applicable to existing returns filed within three years of its effective date, would extend the commissioner's authority to propose deficiencies against appellants for the taxable year 1936 to April 15, 1941, or four years after the filing of the returns.

Respondent commissioner argues that limitations on the time within which tax assessments may be levied are statutes of limitations; that a person has no vested right in the running of a statute of limitations unless it has completely run and barred the action. That the legislature has absolute power, at any time before the action is barred by the statute to amend it and thereby alter the period of limitations therein prescribed, subject only to the requirement that a reasonable time must be allowed for the prosecution of an action or proceeding after the passage of an amendment shortening the period. That an amendment to a statute of limitations enlarging the period of time within which an action can be brought as to pending causes of action is not retroactive legislation and does not impair any vested right. Lewis v. Reynolds, 284 U.S. 281, 283, 52 S.Ct. 145, 76 L.Ed. 293; Davis & McMillan v. Industrial Accident Commission, 198 Cal. 631, 636, 637, 246 P. 1046, 46 A.L.R. 1095. In answer to the foregoing, appellants insist that in the cases at bar, the restriction upon the time within which the commissioner might give notice of a proposed deficiency is not a statute of limitations but is a condition precedent to the imposition of a deficiency. That compliance with such condition precedent is an indispensable factor in the right to impose and collect a deficiency because of the declaration contained in the statute that "No deficiency shall be assessed or collected with respect to the year for which such return was filed unless such notice is mailed within such period."

[1] It is established by creditable authority that a difference exists between a statute of limitations and conditions which are annexed to a right of action created by statute. 34 Am.Jur., p. 16, sec. 7. Into the latter class may, for instance, be assigned charter provisions requiring the filing of a claim with a municipality within a prescribed time after the happening of an event and before the commencement of

an action thereon; a statute which fixes the time within which lands sold at executions may be redeemed, or within which a judgment or lien shall be enforced; or a statute which fixes the time within which writs of error shall be brought. People v. Kings County Development Co., 48 Cal. App. 72, 74, 191 P. 1004. Into the former classification may be placed "Such legislative enactments as prescribe the periods within which actions may be brought upon certain claims, or within which certain rights may be enforced." (Wood on Limitations 3d Ed., sec. 1; People v. Kings County Development Co., supra, at page 74 of 48 Cal.App., at page 1005 of 191 P.). Section 19 of the Personal Income Tax Act expressly makes the right of respondent commissioner to collect a deficiency tax dependent upon his giving of the notice of proposed deficiency within the time prescribed by the statute. We are, therefore, persuaded that the time provided for the assertion of respondent commissioner's right to collect a deficiency tax is a condition of the right and not a statute of limitations. And the right, not merely the remedy, is lost unless seasonably enforced. The time limitation is a condition precedent to the cause of action and is a requirement that must be fulfilled before a cause of action can arise against which a statute of limitations can run. Therefore, such a time limitation is not in itself a statute of limitations, but is an integral part of the cause of action itself. "The time element is an inherent element of the right so created, and the limitation of the remedy is *a limitation of the right.*" 34 Am.Jur. 17. (Emphasis added.)

Though it be assumed that the foregoing provisions do constitute a statute of limitations, a more serious question, and, we feel, one that is determinative of the appeals herein, is presented by the provision in section 23 of the act wherein it is ordained that the amendment extending the time from three to four years "shall be applied in the computation of taxes accruing subsequent to December 31, 1938."

What is meant by "computation" of taxes? The Personal Income Tax Act requires the taxpayer to file an annual return showing "the items of his gross income and the deductions and credits allowed by this act." (Sec. 3). Under section 5 the tax is levied at graduated rates upon the taxpayer's "net income". In section 6 "net income" is defined as "the gross income *computed* under section 7 of this act less the deductions allowed by section 8 of this act". Thus, in the first instance, the amount of the tax is "computed" by the taxpayer "computing" his gross income, and then "computing" his net income. Sections 7 and 8 of the act direct the taxpayer how his gross and net income shall be "computed". Having completed the "computation" of his gross and net income, the taxpayer applies the prescribed tax rate, calculates his tax, files his return and pays his tax. Examination by us of the act reveals that the "computations" therein required are not mere mathematical calculations, but involve the assembling of all pertinent information regarding items of gross income, allowable deductions, and exercise of the taxpayer's judgment in determining which items to include and exclude.

Section 19 of the act then requires: "As soon as practicable after the return is filed, the commissioner (defendant) shall examine it and shall determine the correct amount of the tax. If the commissioner determines that the tax disclosed by the original return is less than the tax disclosed by his examination he shall mail notice to the taxpayer at his last known address of the deficiency proposed to be assessed. The notice shall set forth the details and *computation* of such deficiency." (Emphasis added.)

Thus the act provides for two "computations" of the tax—one by the taxpayer and one by the commissioner, to determine whether, in his judgment, the taxpayer's "computation" was correct.

[2-4] The act further provides that if the commissioner finds that the taxpayer's "computation" is incorrect, he must give the taxpayer notice and opportunity for hearing within the time prescribed by law before the commissioner may finally determine and assess a deficiency tax. Manifestly, this hearing is granted so that the taxpayer may be heard to present his views

of how the gross and net incomes should be "computed" in determining the tax liability. It is noteworthy that the words "compute", "computed", and "computation" are used throughout the Personal Income Tax Act and the amendatory act of 1939 in the sense of ascertaining the proper tax base—i. e., the taxable income—and applying thereto the appropriate tax rate, producing a given amount of tax as the end result. It being the rule that a word used in one place in a statute is deemed to be used in the same sense throughout that statute unless a different meaning is indicated (Coleman v. City of Oakland, 110 Cal.App. 715, 719, 295 P. 59) it would seem obvious that the foregoing meaning of the term as used in other places in the statute was the meaning intended by the legislature when it chose the language of section 23, whereby it was ordained that the amendatory act "shall be applied in the *computation* of taxes accruing subsequent to December 31, 1938". We are persuaded that under the statute now before us, the determination of a deficiency tax necessarily embraces the "computation" of a tax. United States v. Whyel, 3 Cir., 28 F.2d 30; Russell v. United States, 278 U.S. 181, 49 S.Ct. 121, 73 L.Ed. 255. From an examination of the statute, the conclusion seems to be inescapable that section 23 of the amendatory act clearly evidences a legislative intent to make the extended time granted the commissioner applicable only to taxes accruing subsequent to December 31, 1938. It expressly says so. As heretofore pointed out, "computation" of the tax is an integral part of the commissioner's duty in determining the correct amount of gross income and net income before a deficiency tax may be imposed. And in such "computation" the taxpayer has a legal right to be heard in aid of the commissioner's function to correctly "compute" the gross and net income before any deficiency tax is finally levied. While the legislature could have gone back to taxes, the "computation" of which antedated December 31, 1938, had it expressly so stated, under the statute as worded, such was not the purpose or intent. The very language used belies such legislative intent. On the contrary, the language of section 23 of the amendatory act clearly and explicitly provides that effect is not to be given the amendments in the "computation" of taxes accruing prior to December 31, 1938. Were we to hold otherwise, we would be departing from the meaning of language which is free from ambiguity and such a pretended construction would not be construction at all but would be legislation. Courts have no power to legislate. Our power to interpret statutes does not include the power to rewrite a statute to accord with a presumed legislative intent.

We therefore hold that the notice of proposed deficiency tax required by the statute to be given to the taxpayer is an essential part of the process of "computation" as established by the act. Extension in 1939 of the time within which such notice must be given concerned the process of "computation of the tax". By express mandate of the statute, respondent commissioner was forbidden to apply the alteration in time in the "computation" of any tax accruing prior to December 31, 1938. The taxes here in question having accrued not later than December 31, 1936, respondent commissioner was without authority to levy the deficiency taxes which gave rise to this litigation.

[5-7] Respondent next directs our attention to the fact that the Attorney General has specifically ruled that the 1939 amendment to the Personal Income Tax Act, extending from three to four years the time within which deficiency assessments may be proposed, is applicable to deficiencies for taxable years ending prior to December 31, 1938, so long as the right to issue such deficiencies was not barred on July 22, 1939 (effective date of the amendment). That prior to the issuance of such opinion by the Attorney General, the Franchise Tax Commissioner, pursuant to the powers granted by the Personal Income Tax Act to prescribe regulations for the application of the act, on February 1, 1940, published a regulation wherein a similar "interpretation" of the act was enunciated. That an identical ruling was announced by the State Board of Equalization. Respondent then argues that, for

a period of some seven years, the 1939 amendment to section 19 of the Personal Income Tax Act has been applied uniformly in accordance with the foregoing administrative construction, and that under the rule that administrative construction of a statute long and consistently adhered to should be given great weight by the courts in construing the language of such statute, it should be followed by the courts. This argument is unavailing for two reasons. In the first place, while the interpretation of a statute by an administrative agency, or its legal advisors, will be accorded great respect by the courts and, if not clearly erroneous, will be followed by the courts, nevertheless, if erroneous, such construction will be overthrown where such a question of law is properly presented. Secondly, the clear meaning of the statute cannot be altered by administrative construction. As was said in Dillman v. McColgan, 63 Cal.App.2d 405, 409, 146 P.2d 978, quoting from United States v. Missouri Pacific R. Co., 278 U.S. 269, 277, 278, 49 S.Ct. 133, 136, 73 L.Ed. 322, 376, "It is elementary that, where no ambiguity exists, there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written, must be relieved by legislation * * * Construction may not be substituted for legislation."

[8-10] Finally, respondent asserts that since appellants have failed to show that they have paid more taxes than in equity and good conscience should have been paid, they cannot recover in this litigation for refund. In support of this claim, respondent cites the cases of Pacific Fruit Express Co. v. McColgan, 67 Cal.App.2d 93, 96, 97, 153 P.2d 607; DeMille v. Los Angeles County, 25 Cal.App.2d 506, 511, 77 P.2d 905. However, in the cited cases it was conceded that at the time of the assessment the taxing authority was invested with the right to levy an assessment, but the taxpayer contended that his property was overassessed. Obviously, where the taxpayer concedes that his property was subject to taxation, but contends that it was overassessed, and that the assessment levied against it was disproportionate to the value thereof, a court of equity will first require that an offer be made to pay such tax as may be found to be equitably or justly due. The cases of Crossett Lumber Co. v. United States, 8 Cir., 87 F.2d 930, 932, 109 A.L.R. 1348, 1352, and Lewis v. Reynolds, 284 U.S. 281, 283, 52 S.Ct. 145, 146, 73 L.Ed. 293, involve the doctrine of equitable recoupment. The doctrine and cases applying it presupposes two valid claims, one offsetting or diminishing the other. Codified in Code Civ.Proc., sec. 438. The doctrine of equitable recoupment allows the defendant to offset against the claim of the plaintiff a debt of plaintiff to defendant that in equity and good conscience should be paid, although the time within which the defendant might initiate an action to enforce such debt may have expired. In suits to recover refunds and to enforce deficiencies the doctrine has been applied in a number of cases, both in favor of and against federal taxing authorities. 109 A.L.R. 1354, 1363; 130 A.L.R. 838, 845; 154 A.L.R. 1052. Furthermore, a defense of equitable recoupment, which is one species of set-off, is an affirmative defense and must be separately pleaded. Cullinan v. McColgan, 87 Cal.App. 684, 701, 263 P. 353; Williams v. Parker, 30 Cal.App. 71, 75, 157 P. 550; Code Civ.Proc., secs. 437, 438, 439. But in the case now engaging our attention, the assessing officer was without any authority to make the assessments complained of in any amount, and no such usurpation of power can find absolution in a plea of equity.

For the foregoing reasons, the respective judgments from which these appeals were taken are, and each is, reversed, with directions to the court below to enter judgments for the respective plaintiffs as prayed for.

YORK, P. J., and DORAN, J., concur.

SIMMONS v. CALIFORNIA INSTITUTE OF TECHNOLOGY et al.*

Civ. 15109.

District Court of Appeal, Second District, Division 1, California.

Nov. 21, 1946.

Rehearing Denied Dec. 2, 1946.
Hearing Granted Jan. 16, 1947.

1. Appeal and error 🔑989

Where verdict is attacked as being unsupported by evidence, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury.

2. Appeal and error 🔑930(1), 931(1)

In reviewing the evidence on appeal, all conflicts must be resolved in favor of respondent, and all legitimate and reasonable inferences indulged to uphold the verdict if possible, and such rule also applies to findings and judgments of a trial court.

3. Appeal and error 🔑994(3), 1010(1)

Findings and judgment of a trial court sitting without jury must be sustained on appeal if there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support thereof.

4. Master and servant 🔑62

In action to have declared void an agreement entered into by plaintiff with defendant institute conferring royalty rights upon defendant with reference to invention conceived by plaintiff while in employ of defendant, either on ground of want of consideration or on ground of fraud in the inducement, evidence supported judgment for plaintiff.

5. Evidence 🔑434(8)

Parol evidence, to show that plaintiff was induced by fraud to enter into agreement with defendant institute conferring royalty rights upon defendant with reference to invention conceived by plaintiff while in employ of defendant, was properly admitted as an exception to parol evidence rule. Code Civil Proc. § 1856, subd. 2.

YORK, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Edward E. Simmons against the California Institute of Technology and another for declaratory relief concerning two alleged agreements between parties involving plaintiff's inventions. From an adverse judgment, the defendants appeal.

Affirmed.

O'Melveny & Myers, Pierce Works, and John Whyte, all of Los Angeles (Lyon & Lyon, of Los Angeles, of counsel), for appellants.

Samuel L. Kurland and A. Arnold Klein, both of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal by defendants from the judgment in an action for declaratory relief.

The action is concerned with two alleged agreements between plaintiff and defendants involving plaintiff's inventions. The first agreement dated February 21, 1940, which will be referred to herein as Exhibit A, was signed by plaintiff and witnessed by defendant Clark, and conferred upon defendant Institute certain royalty rights with reference to the inventions. The other agreement, Exhibit B, dated March 13, 1940, the execution of which was approved by the Institute, was a contract between The Baldwin Locomotive Works and plaintiff relating to the development, exploitation and patenting by Baldwin of plaintiff's inventions, and, with certain reservations, granted an exclusive license to Baldwin to make, use and sell the inventions; also, like Exhibit A, it provided for the payment to the Institute of royalties derived from such use and sale, subject to plaintiff's right to demand and receive 40% of such royalties at any time upon thirty days' notice.

The remedy sought by plaintiff's first amended complaint was a judicial declaration that Exhibit A had been totally rescinded and was therefore null and void; and that Exhibit B, which was based upon Exhibit A, was also null and void and had been rescinded insofar as it purported to confer rights upon the Institute, together with a judgment for such royalties as had been received by the Institute under the agreements. The ground for rescission was alleged to be want of consideration on the part of the Institute, as to both agreements, as well as fraud in the inducement of both. The charge of fraud was predicated upon two alleged promises assertedly made without the intention to perform them by defendant Clark, who was then a member of the faculty of the Institute and in charge of a commercially sponsored project known as "Impact Research," in the activities of which plaintiff was employed at the time the two agreements were executed.

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* Subsequent opinion 188 P.2d 1.

The trial court found that plaintiff received no consideration for Exhibit A, and that there was "no consideration for said licensing agreement, Exhibit B, in so far as said agreement purports to confer rights upon defendant" Institute; that defendant Clark made the fraudulent statements, and that his acts and representations were neither authorized nor ratified by the Institute.

Judgment in favor of plaintiff decreed that the instrument dated February 21, 1940, known as Exhibit A, was null and void and of no effect whatsoever; that the agreement of March 10, 1940, Exhibit B, in so far as it purported to grant any rights upon the Institute was "null and void and of no effect whatsoever"; and that the Institute had "no right, title or interest in or to the royalties accrued and unpaid from Baldwin Locomotive Works in the sum of $11,454.14, or any other royalties or monies therefrom, accrued or to accrue." Also, that plaintiff recover from Institute the sum of $2,004.94 on account of past royalties.

From such judgment, defendants California Institute of Technology and Donald S. Clark appeal, urging as grounds for a reversal thereof the following:

A. The finding that the execution of either Exhibit A or Exhibit B was induced by fraud is without support in the evidence;

B. That the court erred in admitting any evidence under the fraud count;

C. The findings as to want of consideration for the benefits conferred upon the Institute are without support in the evidence;

D. Plaintiff is not entitled to the relief which he seeks.

Respondent entered the Institute as a student in 1930 or 1931, graduated in 1934 and received a master's degree in 1936; and during this time and for some time thereafter did various and sundry work as an employee of the Institute. During the summer and fall of 1936, respondent occupied an office in the electrical engineering department on the campus and worked for various people, both at the Institute and on the outside.

In the latter part of August, 1936, defendant Clark and Dr. Datwyler, in connection with their work for the Institute on a project in Impact Research, were in the process of developing "an impact dynamometer; in this case, an electrical dynamometer is a device for translating instantaneous forces into instantaneous electrical impulse so that they will be recorded by means of an oscillograph." In the construction of such a device, "there was a need of some sort of strain sensitive element," in regard to which Dr. Datwyler, who was working under Dr. Clark's supervision, experienced some difficulty. These two men approached respondent "stating their problem to him with reference to their necessities in connection with strain testing apparatus which they were then endeavoring to perfect." During these consultations, respondent "was not being paid either by the school or by anybody else." Respondent suggested the use of a fine wire to be bonded with a material called Glyptal to the material undergoing the test. During September or October, 1936, Dr. Datwyler reduced such suggestion to practice by the construction of a machine at the Institute successfully embodying respondent's ideas, which machine was continually in use at the Institute in connection with the impact research project from that time to June, 1941. Respondent's suggestion is the basic idea underlying the patent which constitutes the subject matter of the two contracts here involved.

The record reveals that respondent was not employed by the Institute during the period of conception of this invention, but in December of 1936, was employed by the Institute in Impact Research in the construction and operation of pump testing equipment, and continued in such employment upon a yearly basis to July, 1941. From 1938, respondent was placed on a fellowship basis in order that a specified number of hours per month might be devoted to the impact project.

In the fall of 1939, respondent was introduced to a Mr. Tatnall, head of the testing machine sales division of Baldwin Locomotive Works, who was very much interested in "wire strain gauge development," said company having already entered into a preliminary agreement with Mr. Ruge and Dr. deForest of the Massachusetts Institute of Technology, who "had built a large number of these wire strain gauges and were using them on structures without success," with the view to "obtaining a patent on this subject." During the course of these talks it came to light that the original bonded wire gauge was developed by respondent, hence Mr. Tatnall on a visit to the west coast "came in to look into the matter of my (respondent) having invented the wire strain gauge." Mr. Tatnall stated that Baldwin wished to obtain patent protection for such a device and that it would prosecute and obtain the patent, pay royalties for an exclusive license, and would exploit and advertise the invention to the utmost. Thereafter, Mr. Hathaway, patent attorney for Baldwin Locomotive Works, came to Pasadena to obtain the technical information necessary for the patent specifications and claims. Respondent testified that "after Mr. Hathaway was here, Dr. Clark suggested that there ought to be some sort of agreement entered into between myself and the Institute in order that these funds, which later would arrive from royalties, might be paid to Impact work, and he stated that the Baldwin Locomotive Works was interested in having the Institute a party in this agreement, and that he thought it would be a generally good idea that the Institute could handle these funds through their channels. The money would then be paid to the Impact fund * * * 'and the thing to do is to use the income from this invention of yours for the further development of impact testing and dynamic test procedures, and that, along with the income from these commercial sponsors, would make the continuation of the Impact Research project a possibility.'" To this plan, respondent agreed. The record also reveals that respondent and Dr. Clark discussed the former's continued employment at the Institute, Dr. Clark stating: "As long as we have interests from commercial people carrying on this work, I don't see any reason why you should not continue to work here; there is development of equipment to be done, carrying on of new projects, and if you have income from this promising-looking invention, it is very probable that the Impact Research will continue on for an * * * indefinite period; there is a good deal of work to be done in this field. We are just more or less scratching the surface so far, as far as dynamic testing goes." The substance of the whole matter was "that Dr. Clark said that I had a good position with the Institute, and it probably would continue that way because my work was perfectly satisfactory to everybody concerned. * * * as long as there were funds coming into Impact from whatever source, my employment would continue because I was needed in the work."

As a result of the various negotiations and discussions hereinbefore related in part, respondent executed the agreement, herein referred to as Exhibit A, on February 21, 1940, to the following effect: "In consideration of my employment by the California Institute of Technology, I agree that as to my inventions involving an electrical strain gauge wire secured throughout its length to the surface of a member adapted to be subjected to strain, and also my inventions relating to the measurements and indications of various conditions including impact testing, all as set forth in application for United States Letters Patent executed by me under date of February 9, 1940, I will not grant any licenses to make, use or sell apparatus or methods embodying any of said inventions unless such licenses are approved by the California Institute of Technology * * * any license so granted to be subject to such terms and conditions as may be reasonably required by the * * * Institute * * * The royalties on said inventions shall be paid to the * * * Institute * * * unless at my option I shall request in writing to * * * Institute * * * and any licensee at least thirty (30) days prior to the end of any three (3) months' period in which royalty accrues that up to and including forty per cent (40%) of the total royalty paid by any licensee shall be paid to me by the said licensee. I agree not to grant any license or make any assignment of said inventions or patent rights thereto without the express consent of the California Institute of Technology, or committees or other agencies or bodies which the California Institute of Technology may designate." To this document the name of appellant Donald S. Clark is appended as a witness.

On March 13, 1940, respondent and Baldwin Locomotive Works executed the agreement known as Exhibit B, with reference to the inventions described in Exhibit A, whereby respondent granted to said Baldwin an exclusive license to manufacture for use and sale "apparatus embodying said inventions throughout the United States," subject to certain specified reservations and conditions. In return for this, Baldwin agreed to pay a royalty of five per cent, "of the sales price or of the gross income received by Baldwin from rentals or other uses of that portion of any apparatus sold, rented or otherwise used embodying said inventions. * * * All royalties hereunder shall be paid within thirty (30) days after the end of any three (3) months' period in which royalty accrues * * *. Said royalty shall be paid to the Institute, unless Simmons at his option shall request in writing to Baldwin and to the Institute, at least thirty (30) days prior to the end of any three (3) months' period in which royalty accrues that any portion up to and including forty per cent (40%) of said royalty shall be paid to him by Baldwin." In case of default by Baldwin, respondent, with the approval of the Institute, was given the right to terminate the license granted upon giving certain notice.

Said agreement also provided: "After January 1, 1942, Simmons, with the approval of the Institute, reserves the right to cancel this agreement upon sixty (60) days' notice if the income from Baldwin for such license rights falls below One Hundred Dollars ($100.00) in any quarter beginning with January 1, 1942, Provided, However, that Baldwin shall have sixty (60) days after receipt of said notice in which to make up any deficiency in said amount and that if said deficiency is not made up within that time, then this agreement shall terminate forthwith." Granting of such license by respondent to Baldwin was duly approved by the California Institute of Technology in accordance with agreement Exhibit A.

Under date of January 16, 1942, respondent addressed a communication to the Board of Trustees of the Institute, to the effect that since executing the two agreements, it was "discovered that the California Institute of Technology had no authority to enter into such agreements or to assert the claims which were made at the time the writings were executed nor were they entered into validly. In order to avoid any ambiguity, I hereby rescind and renounce the said writings in so far as they involve the California Institute of Technology" and invited the Institute to consider the matter and present reasons for such claims as it might have.

In a second communication dated February 13, 1942, respondent demanded that Institute "voluntarily agree to cancel said instruments and pay to me all the royalties received by the Institute under the Baldwin license of March 13, 1940. I have delayed notifying the Baldwin Locomotive Works of my January 18 rescission and the taking of any other action in order that the Institute be in no way embarrassed. However, unless the Trustees act positively on this matter during this session, I will be forced to notify Baldwin and bring suit." The instant action followed.

In connection with the first contention, that the evidence fails to support the finding of fact that the two agreements were induced by fraud, appellants assert that "the lower court found that plaintiff was induced to execute Exhibit A and consequentially Exhibit B, because of two promises allegedly made by Dr. Clark which, assertedly, neither he nor the Institute had any intention of performing. These were in substance (1) that plaintiff would be given permanent employment in Impact Research, and (2) that the royalties received by the Institute would be utilized in maintaining that project."

As hereinbefore stated, the record discloses that respondent and Dr. Clark discussed the question of respondent's employment "upon the coming in of royalties," at which time "Dr. Clark said, 'As long as we have interests from commercial people carrying on this work, I don't see any reason why you shouldn't continue to work here; there is development of equipment to be done, carrying on of new projects, and if you have income from this promising-looking invention, it is very probable that the Impact Research will continue on for an indefinite time, indefinite period; there is a great deal of work to be done in this field. We are just more or less scratching the surface so far, as far as dynamic testing goes.' At one time he stated that I was working myself into a very nice position at the Institute, because everybody at the Institute was convinced that I had abilities to design and develop new ideas, and that was one of the things they were much interested in, and not only Impact Research have work to do, but these various other people would also have other work to do and there was no doubt at all but what I could continue with the work. * * * *The substance* of the whole matter was that Dr. Clark said that I had a good position with the Institute, and it *probably* would continue that way, because my work was perfectly satisfactory to everybody concerned."

With respect to Dr. Clark's alleged promise that the money received from the royalties should go to Impact Research, respondent testified that "Baldwin, of course, didn't want to proceed with the patent unless they were assured that they were going to get the license under the patent as they wished, so Doctor Clark and I had discussions over what kind of an arrangement we would make so that the Impact Research could obtain the funds from the royalties, and at first I suggested that some sort of agreement be made whereby Impact Research would get all the income off the royalties as long as Impact Research projects were—that is the monies for operation of the Impact Research project were furnished at least partially by commercial firms because I felt that as long as commercial firms were interested in this matter, then something of value would come out of the developments. I thought that a good proposition would be that I would agree * * * that the income from the patent royalties be all paid for the Impact Research Fund for their use in impact as long as say at least 50 percent of the impact operational expenses were paid by commercial firms and Doctor Clark took that proposition under consideration, but in a latter discussion he said it would not be possible for the Institute to handle the funds providing the royalties go to impact under those conditions, that they didn't want to enter into such an agreement as that. * * * At that time Doctor Clark told me that I had no need to worry about the matter anyway, the funds would all go to Impact Research because after all the development of this equipment leading to the interest of Baldwin in the invention, it all came from the fact that Impact was using this invention and that he couldn't see why the Institute or any of the other Institute departments would have any claim on the use of these funds because they were foreign to their operations. * * * as time went on, Mr. Hathaway was apparently pressing Doctor Clark for some sort of definite basis on which Baldwin could proceed and so these discussions would come up from time to time because of that and after awhile why I suggested that perhaps a good arrangement would be to provide that I could draw a certain portion of the royalties if it appeared that the funds were becoming large and that the funds were more than the Impact Research project needed. I thought it would be desirable whereby I could draw a portion of those funds under those conditions, but I was fully in accord of having Impact get all the funds until such time it seemed it might be from the enthusiastic words of Mr. Tatnall that the thing might produce quite an income in wide industrial application and Doctor Clark said an agreement like that would be perfectly satisfactory to him and it could be worked out in the agreement. I think that is the substance of most of the conversations along that time. Q. Did he say anything to you in regard to any necessity of or custom for the monies to be paid to the School, even though it was being used by a particular project? * * * A. Yes. * * * Sometime in discussions that came up where I thought it might be better if I held the control of the royalties and have them paid into the Impact fund. Doctor Clark said, 'The Institute cannot operate their funds on a basis like that; they have got to have some sort of definite commitment; we cannot just go along with a haphazard arrangement of that sort. The Institute will have to have some sort of definite procedure so that the funds can be handled through the Institute account and handled through the Impact fund; the Impact fund cannot operate on funds which come in from the outside directly, they have got to be all paid into the Institute and handled in an administrative way.' I had no need to worry about that, anyway, because the intent was, Doctor Clark stated, that all the funds would be used in Impact."

In respect to any authority to employ persons for the Institute, Dr. Clark testified: "No, I wasn't authorized to employ * * * I was authorized to recommend," and further stated that "The employment itself was up to the Institute council or committee of the school," of which group Dr. Clark was not a member.

Further evidence disclosed by the record is to the effect that notwithstanding the inducements held out by Dr. Clark in reference to the respondent's employment, and the use of the Baldwin royalties in connection with Impact work; and despite the Institute's apparent approval of the arrangement as evidenced by the written approval appended to Exhibit B; in June 1941, respondent was informed by Dr. Clark "that I (respondent) would not be on Impact Research assistantship next year," and such employment was terminated the following month. Checks from the Baldwin royalties were then coming into the Institute in considerable amounts, a quarterly check received in July, 1941, being in the sum of $500. However, Dr. Clark informed respondent, according to the latter's testimony, that Impact was not getting these funds, that "he (Dr. Clark) had nothing to do with the funds, no control over the funds, that the Institute had the funds and he could do nothing about it, that there would be no possibility of being put on the Impact project regardless, that he had made up his mind, there was no further thing to it, there was no further need of discussing it."

[1-4] Appellants' basic argument is that the trial court's judgment is without evidentiary support. However, as said in Crawford v. Southern Pacific Co., 3 Cal. 2d. 427, 429, 45 P.2d 183, 184, "It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury." Moreover, the rule is well established in this and many other cases, that, "In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible." This rule applies as well to the findings and judgment of a trial court as in a case tried before a jury, and such findings and judgment must be sustained on appeal "if there is any substantial evidence, or reasonable inferences to be drawn, therefrom, in support thereof." Drabkin v. Bigelow, 59 Cal.App.2d 68, 74, 138 P.2d 750, 753. That the record in the instant appeal discloses substantial evidence in support of the trial court's findings and judgment, cannot well be doubted. The trial court found, in respondent's favor, that the written agreements in question were without consideration and were induced by fraud. Whether one or the other of these theories, or a combination of both, is borne out by the evidence, is quite immaterial since in either case the agreements would be equally invalid.

The trial judge, who heard the testimony, and who was in a position to judge of the witnesses' credibility, could well find from the evidence that, through the inducements practiced by appellants, the respondent was led to execute documents which surrendered to the Institute, without consideration, the royalty fruits of respondent's invention. Nor, if such evidence is believed, can it be doubted that an unconscionable situation was thereby created from which the respondent is entitled to relief. There was, for example evidence to the effect that Dr. Clark suggested the making of the contracts in question; that in so doing Clark assured respondent of two vitally important things, namely that respondent's employment would then be secure, and that the royalties would accrue to the Impact Research in which respondent was engaged. Both of these propositions were later repudiated, although, strange to say, the benefits of the arrangement, that is, the right to royalties, were still retained by the Institute. It may also be noted, that although initial authorization on the part of Dr. Clark, was lacking, there was apparent ratification by the Institute, signed by its president, A. C. Balch, appended to Exhibit B, and reading: "The granting of the foregoing license is approved by the California Institute of Technology in accordance with an agreement between Edward E. Simmons, Jr. and the California Institute of Technology dated February 21, 1940" (Exhibit A). That the Institute could not ratify as to benefits and repudiate as to other parts of the arrangement, needs no citation of authority.

Concerning the repsondent's allegation, and the trial court's finding of want of consideration, the record discloses that Exhibit A, the instrument in which respondent agreed not to "grant any license to make, use or sell any apparatus or methods embodying" respondent's invention, without the Institute's approval, etc., was, according to its terms, executed by Simmons "In consideration of my employment." No other consideration is expressed or referred to either in this document or in the appellants' answer. Yet it appears that respondent was already in the employ of the Institute at that time, and there is evidence from which the trial court could conclude that there was no present consideration of any kind supporting this surrender of valuable rights by the respondent, and that the only person in any way benefited, was the Institute. The same may be also said in respect to Exhibit B, the royalty agreement, so far as the Institute is concerned. While it is true that the appellants take issue with this view of the case and presented evidence claimed to negative the respondent's claim, this fact in no manner disturbs the application of the rule hereinbefore stated, that there can be no reversal where substantial evidence is found to support the judgment.

[5] Appellants' contention that the trial court erred in admitting any evidence whatever under respondent's fraud count, because "the promissory fraud alleged tended to vary the terms of the writing, Exhibit A, and hence could not be proven," is sufficiently answered by section 1856 of the Code of Civil Procedure, which expressly states the well known exception to the parol evidence rule as follows:

"2. *Where the validity of the agreement is the fact in dispute.* But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or *to establish illegality or fraud.*" (Italics added.)

Finally, it is asserted by appellents that "Plaintiff is not entitled to the relief which he seeks," by reason of respondent's "failure to return the benefits received," and because "Under no circumstances was plaintiff entitled to the partial rescission which the lower court granted him." The arguments advanced in support of these contentions are not persuasive. As hereinbefore indicated, there is evidence from which the trial court could find that respondent never received any benefits whatsoever in return for his relinquishment.

The judgment is therefore affirmed.

WHITE, J., concurs.

YORK, P. J., dissents.

Rehearing denied; YORK, P. J., dissenting.

76 Cal.App.2d 817

FAHNESTOCK v. FAHNESTOCK.

Civ. 15287.

District Court of Appeal, Second District, Division 1, California.

Nov. 18, 1946.

Hearing Denied Jan. 16, 1947.

1. Divorce 🔑253

Evidence sustained trial court's division of community property in divorce suit wherein wife obtained divorce on ground of husband's extreme cruelty. Civ.Code, § 146.

2. Divorce 🔑252, 286

Community property may be awarded where a divorce is granted on ground of extreme cruelty, in such manner as the court from all the facts and the condition of the parties may deem just, and in absence of clear abuse of discretion, District Court of Appeal is without authority to disturb the order awarding community property. Civ.Code, § 146.

3. Divorce 🔑129

Evidence sustained finding that husband was not guilty of adultery. Civ.Code, § 130; Code Civ.Proc. § 2079.

4. Divorce 🔑296, 312

In determining who should have the custody of minor children of parties to divorce actions, a broad discretion is vested in the trial courts, and only when a clear abuse of such discretion is made, will the trial court's determination be interfered with.

5. Divorce 🔑298(3)

Trial court did not abuse its discretion in awarding custody of 18 year old son to parents jointly, rather than to wife who was awarded divorce on ground of extreme cruelty.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Ethel A. Fahnestock against Noel S. Fahnestock for divorce, wherein defendant filed a cross-complaint for divorce. From adverse portions of the judgment, the plaintiff appeals.

Affirmed.

Lewinson & Armstrong, of Los Angeles, for appellant.

Paul Vallee and Harry J. McClean, both of Los Angeles, for respondent.

YORK, Presiding Justice.

Plaintiff wife sued defendant husband for divorce upon the grounds (1) adultery; (2) cruelty, and asked for all of the community property and the custody of their minor child. The answer denied the allegations as to cruelty and admitted the charge of adultery but alleged it had been condoned and forgiven and that ever since such condonation defendant had treated plaintiff with conjugal kindness. Defendant by amended cross complaint alleged various acts of extreme cruelty inflicted upon him by plaintiff, and prayed for a divorce and an equitable division of the community property, but did not ask for the custody of the minor child.

The court found in paragraph 5 of the findings, that the parties hereto were possessed of the following community property: (a) Their residence valued at $17,500.00, subject to a first mortgage of $6,000.00; (b) Household furnishings valued at $5,000.00; (c) 1942 Ford Coupe; (d) 1941 Chrysler Sedan; (e) Cash in banks $2516.20; (f) 20 shares capital stock of Prentice-Hall, Inc., valued at $1300.00; (g) War Bonds, face value $1200.00; (h) Defendant's right to participate in profit sharing plan of employer, value unknown; (i) Life insurance policies: Aetna for $5,000.00; New York for $6,000.00; New York for $7,000; John Hancock for $1,000; Praetorians for $1,000; the cash surrender value of said policies being $3,769.80; (j) Defendant's interest in pension plan of employer valued at $1,500. Also, the court found with respect to the community property as follows:

"6. That defendant is Sales Manager for Prentice-Hall, Inc., * * * under a contract by the terms of which he is paid a commission on sales of publications made by Prentice-Hall, Inc.; that as of May 15, 1945, the current credit balance of commissions due the defendant was the sum of $26,056.00, subject, however, to chargebacks and offsets * * *; that as of the 15th day of April, 1945, defendant had sold services of Prentice-Hall, Inc., on future contracts, for which defendant is entitled to commission when the customers pay, as follows: 1945, $7,133.60; 1947, $4,159.72; 1948, $702.17; 1949, $428.83; that all commissions under future contracts are subject to chargebacks, offsets and cancellations, over which defendant has no control and against which he has no present right of withdrawal; that commissions for services rendered to date of trial, if, as, and when payable to defendant and not subject to chargebacks, offsets and cancellations, are community property."

The court then found (paragraph 7) that the community property should be divided between the parties as follows: To plaintiff: (a) the residence and household furnishings, subject to the first mortgage; (b) 1941 Chrysler Sedan; (c) the war bonds; (d) two life insurance policies, i.e., Aetna for $5,000; New York for $6,000, she to pay the premiums thereon.

To defendant: "All of the remaining property described in paragraphs 5 and 6 hereof not herein awarded to plaintiff, provided, however, that defendant shall be restrained from withdrawing any of the said current credit balance which as of May 15, 1945, was the sum of $26,056.00, subject to reduction in amount of chargebacks, offsets and cancellations as herein more specifically found, except defendant shall be permitted to receive from and out of the said current credit balance semi-monthly drawing of $700.00 before deductions and withholding for taxes, and shall also be permitted to withdraw from the said balance the additional sum of $1,808.00 for payment to plaintiff's attorneys and the additional sum of $1,650.00 for payment to defendant's attorney, and, in addition such amounts as may be allowed * * * as costs and attorney fees on appeal to plaintiff and equal amount of attorney fees to defendant, and the additional sum of $1,808.00, to pay plaintiff for discharge by her of the following obligations: To her mother on account of loan * * * $600.00; To her attorneys on account of loan * * * $750.00; To Shreve & Co. on account of purchase of silver * * * $350.00; To plumber on account of repairs to house * * * $108.00; Total $1,808.00.

"8. The Court further finds that under the contract of employment between Prentice-Hall, Inc. and defendant, defendant is entitled to receive the sum of $700.00 semimonthly, before deductions or withholding for income taxes, provided that the said current credit balance is not reduced below the sum of $7,500.00, and that if and when the said current balance is reduced below the said sum of $7,500.00, the said semimonthly withdrawal is subject to reduction in amount in accordance with the standard drawing account plan of Prentice-Hall, Inc.; that as of the date of trial the semimonthly drawing account of defendant against the said current credit balance is the sum of $700.00 before deductions or withholding for income taxes. The Court further finds that the current credit balance aforesaid * * * prior to entry of interlocutory judgment herein should be withdrawn by defendant only to pay defendant's semi-monthly drawing account * * * except the amounts provided in paragraph 7 hereof; that commissions on all sales made by defendant, or in which he participates, on and after the date of entry of interlocutory judgment herein shall be free of such restriction; that the Court intends hereby to conserve the credit balance as of the date of entry of interlocutory judgment for the payment to defendant of semi-monthly drawing account of $700.00 before deductions or withholding for taxes to enable him to pay to plaintiff the alimony of $350.00 per month beginning September 1, 1945, herein found to be a reasonable sum to be awarded plaintiff, subject, however, to reduction of the said credit balance by chargebacks and offsets by Prentice-Hall, Inc., under its contract with defendant."

It was also found that if defendant committed adultery on or about April 24, 1943, said act was condoned; that for more than two years prior to the filing of the instant action, defendant was guilty of extreme cruelty toward plaintiff; and that plaintiff was not guilty of extreme cruelty or any cruelty toward defendant, as alleged in the latter's cross-complaint.

By the interlocutory judgment of divorce, it was decreed that plaintiff was entitled to a divorce from defendant on her second cause of action, to wit: cruelty, and defendant was ordered to pay to plaintiff the sum of $350 per month for her support and maintenance, commencing September 1, 1945.

Said judgment divided the community property as follows: "(a) That the home of the parties * * * together with the furniture, furnishings and fixtures therein, by this judgment is declared to be, and is plaintiff's sole and separate property * * * subject, however, to the lien of the first mortgage on said real property.

"(b) Plaintiff shall have right, title and interest as irrevocable beneficiary in and to the following life insurance policies: Ætna * * * $5,000.00; New York * * * $6,000.00, * * * subject to payment of premiums thereon by the plaintiff.

"(c) 1941 Chrysler Sedan to Plaintiff;

"(d) War Bonds of the face value of $1,200.00 to plaintiff;

"(e) Defendant shall have all right, title and interest in and to the following life insurance policies: New York * * * for $7,000.00; John Hancock * * * $1,000.00; Praetorians * * * $1,000.00 * * * as his sole and separate property;

"(f) Cash in banks in the sum of $2516.20; defendant's right to participate in the profit sharing plan of Prentice-Hall, Inc.; 20 shares of the Capital Stock of Prentice-Hall, Inc.; 1942 Ford Coupe; Defendant's interest in the Pension Plan of Prentice-Hall, Inc.; commission standing on the books of Prentice-Hall, Inc., are awarded to the defendant as defendant's sole and separate property; that defendant is enjoined and restrained from withdrawing or causing to be withdrawn any sum or sums from said commission account designated 'Current Credit Balance' in the amount of that balance as of date of entry of this judgment except for the following purposes: To pay to the defendant semimonthly drawing account of $700.00 paid by Prentice-Hall, Inc. To pay attorneys' fees of $1,808.00 to attorneys for plaintiff, and $1650.00 to attorney for defendant. To pay plaintiff's current obligations in the sum of $1,808.00. To pay any amount awarded to plaintiff for costs and attorney fees on appeal and the same amount allowed plaintiff as attorney fees to the defendant's attorney on appeal. * * *

"7. The custody of the minor child, John Alison Fahnestock, is awarded to plaintiff and defendant."

Recapitulation of the award of community property:

To Plaintiff:	
Home	$11,500.00
Furnishings	5,000.00
Aetna Life Insurance Policy	5,000.00
New York Life Insurance Policy	6,000.00
War Bonds	1,200.00
Chrysler 1941 Sedan (no value set)	
	28,700.00
To Defendant:	
New York Life Insurance Policy	7,000.00
Praetorians Insurance Policy	1,000.00
John Hancock (group insurance)	1,000.00
Cash in banks	2,516.20
Capital Stock P-H	1,300.00
Interest in P-H Pension Plan	1,500.00
Interest in P-H profit sharing plan (no value set)	
1942 Ford Coupe (no value set)	
	14,316.20

Current Credit Balance of $26,056.00, subject to chargebacks and offsets, was awarded to defendant, who was restrained from withdrawing any thereof, except his semimonthly drawing of $700.00, (of which he was ordered to pay $350.00 per month alimony to plaintiff) and certain amounts hereinbefore recited, approximately $7200.00.

Plaintiff appeals from that part of said interlocutory judgment which denies her a divorce on the ground of adultery; from that portion thereof which divides the community property between the parties; and from that part which awards the custody of the minor child to the parties jointly.

It is here claimed by appellant that the court erred in awarding her less than half of the community property and that she is entitled to more than half, as a matter of right.

With respect to the disposition of the community property of the parties to a divorce action, section 146 of the Civil Code provides as follows:

"One. If the decree be rendered on the ground of adultery, incurable insanity or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the conditions of the parties, may deem just.

"Two. If the decree be rendered on any other ground than that of adultery, incurable insanity or extreme cruelty, the community property shall be equally divided between the parties. * * *"

With respect to the division of community property in a divorce action, the court in Crouch v. Crouch, 63 Cal.App.2d 747, 756, 147 P.2d 678, 682, stated as follows: "In an action for divorce upon the grounds of extreme cruelty, the trial court has the legal right to award such portion of the community property to the offending spouse as it deems reasonable under the circumstances. It may even deny such party any award whatever if, from all the facts and circumstances of the case and conditions of the parties, it may deem such action just. In an action for divorce on the ground of extreme cruelty, subdivision 1 of section 146 of the Civil Code confers upon the trial court a wide latitude for the exercise of its judgment and discretion in assigning the community property to the respective parties and in every case it will be presumed that such discretion has been wisely and properly exercised, and though impliedly requiring that more than one-half of the community property shall be awarded to the innocent party, it does not otherwise limit the discretion of the trial court in making the award. The proportion should depend upon the particular circumstances of each case, and where the trial court has exercised a legal discretion this court, though clothed with the power of revision under the statute, will be slow to interfere with that discretion."

In Falk v. Falk, 48 Cal.App.2d 762, 771, 120 P.2d 714, 719, it was stated: "At least there are many decisions which have held that in the event of a divorce on the ground of either extreme cruelty or adultery, the innocent party is entitled to more than one-half of the community property. Assuming, without so deciding, that that is the established rule in California, there is still a sound discretion imposed upon the trial court to determine under all the facts and circumstances of the case, including the status of the respective parties and their needs, how much in excess of one-half of the community property shall be awarded to the innocent party. We have no disposition to interfere with that discretion of the court, even if we have the authority to do so."

As heretofore pointed out in the "Recapitulation of the award of community property", the trial court in dividing the tangible community assets awarded to appellant double the amount thereof awarded to respondent, and in addition ordered respondent to pay to her $350.00 per month alimony. In awarding the current credit balance to respondent, the court obviously had in mind the protection of appellant, because it restrained respondent from withdrawing any of said credit balance, except his semi-monthly drawing account of $700.00, plus the sums provided in paragraph 7 of the findings, which totaled approximately $7,200.00, in order that a backlog might thereby be maintained out of which appellant's alimony payments could be made.

Appellant admits that the credit balance is subject to deductions, i.e., chargebacks, offsets and cancellations. However, neither respondent nor R. P. Ettinger, president of Prentice-Hall, Inc., would venture to estimate the amount of such deductions. Mr. Ettinger testified: "* * * in the first place, there are a lot of rules under which a man operates in addition to what is in this memorandum. In the second place, it was understood that in case his credit balance was reduced below $7,500.00, that he would go on the standard drawing account plan of February 1, 1944, on which most of our men operate. Under that plan, if his credit balance went below $7,500.00, he would get $325.00 semi-monthly. If it went below $6,000.00, he would get $300.00 semi-monthly, and so it would be continuously reduced as his current credit balance is reduced to the figures shown on this standard drawing account plan. * * * The credit balance can be reduced by three things: 1. Payments to Fahnestock. 2. Bad Debts. If an account isn't paid in a certain length of time, the commission on the account is charged back to Mr. Fahnestock. 3. Cancellations. If a customer cancels an order, the commission is charged back. Now, the way that happens, for example, is this: Fahnestock takes an order several months ahead of time, such as a renewal order on the Price Control or Regulatory Service. He may take the order in January for renewal to start in July or October. Now if, in July or October, the Price Control or the Regulatory Controls are relaxed or discontinued, the customer may cancel the order and the commission is charged back at the time of cancellation. * * * There is another way, yes. The Service itself might be discontinued. For example, if Price Control is discontinued completely, we could discontinue the Service, in which case the cancellation would be initiated by us and the commission would be charged back to the salesman. Now if these war controls are abandoned, we would discontinue the Service covering them. Mr. Schlesinger: Why shouldn't you continue to pay $700.00 semi-monthly when the credit balance gets down to $7500.00? Mr. Ettinger: In the first place we agreed not to pay it to him. But the reason for that I think is best explained by looking at our original arrangements. Under our arrangements or agreements with the salesmen, the salesman is not entitled to any commission until the customer pays. Now formerly back in 1943, we kept the current account of a salesman showing the NCUP (No Commission Until Paid) in one column and the straight commission, or the actual commission due a man, in another column. Now the salesman couldn't touch the amount in the NCUP column because that represented 'no commission until the customer paid.' * * * When the customer paid, it was transferred to the straight commission column. In order to simplify our record keeping, we combined the two columns. Actually, therefore, what is now in the straight commission column is a combination of a substantial amount of commissions that the salesman is not entitled to until the customer pays. Probably half of the amount of the $26,000 now shown in Mr. Fahnestock's 'Straight Commission' column represents what would have been NCUP and, therefore, represents what Mr. Fahnestock would not have been entitled to withdraw until the customer paid. In order to simplify matters, we combined everything in one column but required a 'cushion' in case a number of customers didn't pay." Mr. Ettinger stated that Mr. Fahnestock's credit balance at the end of 1943 and the beginning of 1944 "was $12,788.00. * * * As of May 15, 1945, it was $26,056.00. * * * That credit balance may be reduced * * * due to payments to Fahnestock, bad debts, cancellations by the customers or discontinuance of the Service. Now, as a matter of fact, in the last few weeks Mr. Fahnestock's credit balance was actually reduced by approximately $600.00. The credit balance has gone up considerably in the last few years because of an abnormally large volume of business which, in my opinion, is due to the sale of a lot of the Services connected with the regulation of business due to the war and the credit balance can go down just like it went up. * * * We pay him a gross sum, out of which he pays his own travel and entertainment and related expenses, including automobile, gasoline and so on. He also pays for a number of items he uses in the business or gives away to customers, such as the item of $110.00 * * * the payment for memorandum books produced by Prentice-Hall that Mr. Fahnestock purchased * * * to give away to his customers. * * * I would like to make available to all parties concerned, all information that would be helpful in working out an equitable solution to this problem. I think it would be a vital mistake for both Noel and Ethel to draw down any substantial part of the present credit balance. If this is done, next year or the year after, when business isn't as easy to get and when a number of subscribers may cancel the account, it would be altogether too close to the $7500.00 margin to permit of safety. I think everybody would be much better off if the present credit balance were kept as large as possible, so that there could be a continuation, for as long a time as possible, of the payment of the $700.00 semi-monthly. When you look at the records and see that Mr. Fahnestock's credit balance increased from some $12,000.00 in December 1943 to $26,000.00 in May 1945—about a year and a half—it would appear that the account has benefited from a rather inflationary volume of business and that a reversal of this trend might put Mr. Fahnestock's account in a dangerous position, particularly if any substantial part of the credit balance were withdrawn at this time. The safe thing to do is to leave as much credit balance as you can, so that the $700.00 (semi) monthly payments can be continued as long as possible."

[1] From the foregoing, it is obvious that the withdrawal of $1400 monthly and the $7200 allowed by the court to be withdrawn for payment of attorneys' fees, etc., plus the inevitable chargebacks, offsets and cancellations to which Mr. Ettinger referred, would result in a reduction of the credit balance found to be $26,056.00 as of May 15, 1945, to a sum far below the $7500.00 required to be maintained by respondent. Consequently, appellant was awarded more than half of the community property in a division which was eminently fair and just.

[2] As stated in Price v. Price, 71 Cal.App.2d 734, 739, 163 P.2d 501, 504, "The law is established in California that community property may be awarded where a divorce is granted on the ground of extreme cruelty in such manner as the court from all the facts of the case and the condition of the parties may deem just. (Section 146, subdivision 1, of the Civil Code.)

"In the absence of a clear abuse of discretion this court is without authority to disturb the order of the trial court awarding the community property. In the instant case there is no showing that the trial court abused its discretion. Plaintiff received the sum of $2500, while the defendant was awarded (a) furniture valued at $1000, (b) trucks valued at $1200, (c) a De Soto automobile worth $1450, and (d) a milk route of undetermined value. It is evident the foregoing disposition of the community property was not unfair to either party."

[3] Appellant urges that "the court erred in not finding there was adultery, and in not finding that the condonation had been revoked." While it is true that appellant testified regarding her charge of adultery, there was no corroboration of her testimony, as required by section 130 of the Civil Code. Also, under the provisions of section 2079 of the Code of Civil Procedure, respondent's admission of the charge of adultery was "not of itself sufficient to justify a judgment of divorce."

Appellant also contends that the joint custody of the minor son should "be set aside and the father be given the mere right of visitation."

[4] "It is the settled rule that, in determining who should have the custody of the minor children of the parties to divorce actions, a very broad discretion is vested in the trial courts. It is only when a clear case of abuse of said discretion is made out that this court will interfere with the determination of the trial court on appeal. Taber v. Taber, 209 Cal. 755, 290 P. 36; Simmons v. Simmons, 22 Cal.App. 448, 134 P. 791." Prouty v. Prouty, 16 Cal.2d 190, 191, 105 P.2d 295, 296.

The minor child here involved was 17 years of age when the divorce action was filed in August of 1944. In awarding joint custody of the boy, the trial court commented as follows:

[5] "This boy is eighteen years old, and it won't be long before he is able to earn his own way. If he goes into the Naval Service, as I hope he will, Uncle Sam will take care of him, and that will leave the mother free." In the circumstances presented, there was no abuse of discretion by the trial court in awarding the custody of the minor son to the parents jointly.

For the reasons stated, the portions of the judgment appealed from are affirmed.

DORAN and WHITE, JJ., concur.

Hearing denied; TRAYNOR, J., dissenting.

77 Cal.App.2d 145

BEDELL et al. v. DUNIVEN.

Civ. 15390.

District Court of Appeal, Second District, Division 3, California.

Dec. 4, 1946.

1. Automobiles ⚷244(6, 36, 50, 58)

In action by pedestrian for injuries sustained when struck by defendant's automobile, evidence was sufficient to support a finding that defendant was negligent in not seeing pedestrian in an unmarked crosswalk in time to avoid striking her, that his negligence was a proximate cause of collision, but that plaintiff also was guilty of negligence proximately contributing to the collision in that she was running across street and not maintaining a proper lookout and not exercising reasonable care. Vehicle Code, § 560.

2. Automobiles ⚷217(2)
Highways ⚷183

A pedestrian crossing a roadway within a pedestrian crosswalk has duty to exercise reasonable care.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Action by Kathryn C. Bedell and Charles J. Bedell, wife and husband, against James M. Duniven for injuries sustained by plaintiff wife, a pedestrian, as the result of the alleged negligence of defendant in the operation of his automobile. Verdict and judgment for defendant, and plaintiffs appeal.

Affirmed.

A. J. O'Connor and George J. Hider, both of Los Angeles, for appellants.

Parker, Stanbury & Reese and Harry D. Parker, all of Los Angeles, for respondent.

WOOD, Justice.

Plaintiffs, husband and wife, brought this action for damages for personal injuries sustained by the wife, a pedestrian, as the result of an accident allegedly caused by the negligence of defendant in operating his automobile. Trial was by jury. The verdict was in favor of defendant, and judgment was entered thereon. Plaintiffs appeal from the judgment.

Plaintiffs contend that the evidence does not support the verdict, and the trial court erred in denying plaintiffs' motion for a new trial.

The accident occurred April 15, 1945, about 8:30 p. m., on Sunset Boulevard in Los Angeles, west of and near the intersection of Sunset Boulevard and Lucile Street. Sunset Boulevard extends east and west, Lucile Street extends north and south, and both streets are paved. Sunset Boulevard is 76 feet wide, and is divided into 4 traffic lanes—2 for eastbound traffic and 2 for westbound traffic which are separated by a double white line in the center of the boulevard. Streetcar tracks are in the middle of Sunset Boulevard—1 within the inside lane for eastbound traffic and 1 within the inside lane for westbound traffic. Apparently there are no automatic signals or boulevard stop signs at this intersection for east-west traffic.

Defendant was proceeding at the rate of 20 to 25 miles an hour in an easterly direction on Sunset Boulevard. He was in the inside lane for eastbound traffic and about 2 feet south of the double white line. It was dark, and the headlights of his automobile were lighted. The pavement was dry, and the brakes on defendant's automobile were in good condition.

Plaintiff, Mrs. Bedell, will be referred to as the plaintiff. Plaintiff and her 8-year old son, whom she was holding by the hand, were proceeding across Sunset Boulevard in a southerly direction in the unmarked pedestrian crosswalk on the west side of the intersection. After they had crossed the double white line in the center of Sunset Boulevard, plaintiff was struck by the front left portion of defendant's automobile, and she sustained personal injuries.

Defendant testified that automobiles with their lights on were approaching in both lanes for westbound traffic; that he was "blinded" and could not see plaintiff until he "was upon her"; that there were eastbound automobiles in front of him and in the traffic lane to his right; that he followed the automobiles ahead of him, kept in his lane of traffic at all times and traveled at the same speed as the automobiles ahead of him; that he first saw plaintiff just before he struck her, when he was approximately 60 feet west of the prolongation of the westerly curb line of the intersection, when a passenger in his (defendant's) automobile said, "hit the brakes"; that at that time plaintiff was 8 to 10 feet north of the center of the street, approximately 15 feet west of the prolongation of the westerly curb line of the intersection, and she and her son were running, the son running ahead of plaintiff; that when defendant heard his passenger say, "hit the brakes," he applied his brakes forcibly and continued to do so until the collision; that he turned his automobile as far to the right as possible without entering the (streetcar) passenger zone; and that plaintiff ran 5 or 6 steps after he saw her before he struck her.

Plaintiff testified that before proceeding across Sunset Boulevard, she stepped off the curb, saw the "traffic was clear on both sides" and started across the street; that when she arrived at a point which is about 12 feet north of the center of the street she first saw defendant's automobile; that it was the only automobile or other traffic she saw going east; that she was walking at a normal gait; that she did not stop, but continued walking until she was struck; and that she had walked a step or two beyond the middle line of the street. She also testified that she first observed defendant's automobile when she left the curb to cross the street, and did not observe it again until at the time of the collision; that when she left the curb vehicles were approaching from the east one block away; that as she was stepping on the (westbound) streetcar track, she was looking back at an automobile approaching from the east, but she had already crossed the path of that automobile when she looked back; that when she was on that streetcar track she noticed that the automobiles approaching from the east were in the middle of the block; and that she walked approximately 38 feet from the curb to the point where she was struck by defendant's automobile.

Plaintiffs' son, called as a witness on behalf of plaintiffs, testified that he looked "both ways" and then he and his mother started to cross the street; that there were no automobiles going west as they started to cross the street, but there was one going east which was "pretty far away"; that westbound traffic was heavy, but eastbound traffic was not; that he saw some automobiles behind that of defendant; and that when he saw defendant's automobile he and his mother "walked back a little." He also testified that when he saw defendant's automobile he and his mother stopped and waited to see if they could pass, and defendant's automobile looked far enough away for them to get across so they tried it and "got caught"; that they stopped 4 or 5 steps back from where the impact occurred for a couple of minutes to look; that at that time defendant was a little more than a block away, and they took about 4 steps before the accident occurred.

[1, 2] Plaintiffs' argument, in support of their contention that the evidence does not support the verdict, is to the effect that the evidence shows defendant was negligent. The defendant pleaded contributory negligence. The driver of an automobile shall yield the right of way to a pedestrian crossing the roadway within any unmarked crosswalk at an intersection. (Vehicle Code (1941), sec. 560.) The evidence was sufficient to support a finding that defendant was negligent and that his negligence was a proximate cause of the collision. It is the duty of a pedestrian crossing the roadway within a pedestrian crosswalk to exercise reasonable care at all times. O'Brien v. Schellberg, 59 Cal.App.2d 764, 768, 140 P.2d 159. Whether plaintiff exercised reasonable care under the circumstances was a matter to be determined by the jury. There was evidence that defendant's automobile was in clear view; that plaintiff observed its approach when it was in the middle of the block; that she was running; and that she proceeded for a distance of approximately 38 feet and into the path of the approaching

automobile without again looking in its direction. The evidence is sufficient to support an implied finding that plaintiff's own negligence proximately contributed to the collision.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.

BERNIKER v. BERNIKER et al. *

Civ. 15493.

District Court of Appeal, Second District, Division 2, California.

Nov. 22, 1946.

Hearing Granted Jan. 20, 1947.

1. Appeal and error 🔑931(1), 1012(1)

It is not within the province of the Appellate Court to weigh the evidence but the court must view it most favorably to respondent.

2. Appeal and error 🔑1010(1)

The findings of the trial court will not be disturbed on appeal if the record discloses substantial evidence to support them, and all intendments are in favor of the judgment.

3. Appeal and error 🔑989

Where trial court found that appellant held title to community property in trust for respondent and her husband and the finding was sustained by substantial evidence, any conflicting evidence would be disregarded on appeal.

4. Husband and wife 🔑264
Trusts 🔑44(1)

In divorce proceedings finding that business, lease, and bank account were community property and that husband's father held such property as trustee for husband was sustained by substantial evidence.

5. Fraudulent conveyances 🔑64(1)

In order that a transferor of property may be prevented from recovering it from the person to whom it was transferred in trust there must be an intent to avoid claims of creditors and the claims must have been enforceable claims.

6. Fraudulent conveyances 🔑188

Before the court will deny relief on the ground that a trust was created for the purpose of defrauding creditors there must be proof of the claim that was intended to be defeated.

7. Fraudulent conveyances 🔑64(1)

Where there was no evidence that husband had any creditors although he may have believed that there were claims against him, a transfer of property in trust to husband's father was not invalid nor prejudicial to the rights of others and was enforceable by the wife as to her community share or interest in the property.

8. Limitation of actions 🔑103(2)

Until a trust is repudiated by the trustee, the statute of limitations does not begin to run against a voluntary resulting trust or a constructive trust or an express trust. Code Civ.Proc. § 338, subds. 3, 4.

9. Limitation of actions 🔑66(7)

The statute of limitations does not begin to run against a continuing trust until there has been a demand and a refusal to act. Code Civ.Proc. § 338, subds. 3, 4.

10. Limitation of actions 🔑66(7)

Where no demand had ever been made by wife on one holding community property in trust prior to wife's action for divorce and trustee had never repudiated the trust and husband had remained in possession of mercantile business transferred to trustee, statute of limitations did not run against the wife. Code Civ.Proc. § 338, subds. 3, 4.

11. Limitation of actions 🔑102(3)

The statute of limitations never runs in favor of trustee as against the beneficiary while the latter is in possession of the property. Code Civ.Proc. § 338, subds. 3, 4.

12. Trusts 🔑365(2)

Where no legal prejudice against trustee resulted from delay in making a demand for return of property held in trust or by reason of nonenforcement of the trust, the defense of laches was not available to trustee.

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* Subsequent opinion 182 P.2d 557.

13. Equity ⚷67
Trusts ⚷365(4)

Laches is not strictly applied between near relatives and is without significance in the case of a resulting trust since it was not designed to punish the plaintiff, and can be invoked only where the allowance of the claim would, because of the claimant's acts, result in an unwarranted injustice.

14. Trusts ⚷365(2)

Laches is never permitted to be invoked merely to aid a faithless trustee in consummating his wrong.

15. Appeal and error ⚷768

The mere fact that claim of trustee, made in his opening brief, that he had advanced several thousand dollars of his personal funds for improvements in store and for merchandise purchased for which he was entitled to credit before division of property between beneficiaries was not answered by respondent was not a reason for allowing trustee's demand.

16. Appeal and error ⚷172(3)

Where alleged trustee contented himself with the denial of the allegations contained in beneficiary's complaint and at the conclusion of the trial he filed an amended answer to conform to the proof and again failed to plead his claim for expenditures and the trial court found that there was a trust and directed the defendant to turn over one-half of the property to a beneficiary who was entitled thereto, defendant's claim on appeal on account of advancements allegedly made would be denied in view of Appellate Court's holding that finding that trust existed was sustained by substantial evidence.

17. Appeal and error ⚷970(1)
Trusts ⚷372(2)

Where trustee denied existence of trust and his pleading made no claim for expenditures, evidence as to expenditures was admissible in furtherance of claim to ownership, and on appeal the evidence would be considered to have been received for that purpose in view of fact that trial court made no finding as to the validity of claim for expenditures which was asserted for first time on appeal.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action for divorce by Nadine Berniker against Barnett Berniker wherein Nathan Berniker was joined as a defendant on the ground that he held in his name community property belonging to the plaintiff and the principal defendant. From so much of the judgment for plaintiff as directed him to turn over certain property to the plaintiff, Nathan Berniker appeals.

Affirmed.

Samuel Schekman, Walker, Meyers, Ingram & Moser, and Hubert O. Butler, Jr., all of Los Angeles, for appellants.

Wm. Christensen, of Los Angeles, and Barry B. Stepsay, of Studio City, for respondent.

WILSON, Justice.

Respondent brought this action against her husband, who will be referred to as Barnett, for separate maintenance, naming his father, appellant, as a defendant upon allegations that he held community property in his name which Barnett had placed therein in order to defeat the claims of judgment creditors, and which she contended should be divided between plaintiff and her husband. Defendants filed a joint answer denying the allegations of the complaint. After the trial respondent filed an amended complaint praying for a divorce, making the same allegations as to the community property as were contained in the original complaint except that it was not alleged that the purpose of the transfer to appellant was to avoid creditors. The court found that a mercantile establishment in Santa Monica and a bank account, both of which were in the name of appellant, together with a lease in the names of both defendants on the premises wherein said establishment was located, were community property of plaintiff and her husband, and that appellant had no interest therein except the naked legal title as trustee of respondent and Barnett.

An interlocutory decree of divorce was granted to respondent awarding one half of the community property to her and directing appellant to transfer and assign to her an undivided one-half interest in the mercantile establishment, lease and bank account.

Barnett has not appealed. Nathan Berniker has appealed from the entire judgment except that portion granting a divorce to respondent. As grounds for reversal appellant contends that there is no credible evidence that community funds were used to purchase the business in Santa Monica, that the trial court erred in establishing a trust in favor of respondent, and that her claim, if any she had, is barred by the statute of limitations and by laches.

1. The sufficiency of the evidence to sustain the findings and judgment. Respondent and Barnett were married in 1927. For some years after the marriage he was employed as a manufacturer's representative and later in several retail dress stores in Los Angeles and Hollywood. In 1932 he opened a retail dress store in Hollywood. About six months later the business was incorporated and the capital stock was issued to various members of the respective families of respondent and Barnett. Three years later the corporation established a store in Santa Monica. In 1937 the Hollywood store was sold. The Santa Monica business was not a financial success, and an assignment of the corporation's assets was made for the benefit of creditors. In 1938 appellant purchased the Santa Monica store. There is a conflict in the evidence as to whether he purchased it with his own funds or with the money furnished by Barnett. He is a retired building contractor without knowledge of or experience in retail merchandising of wearing apparel. Respondent testified that her husband furnished the purchase money and that it was a part of the proceeds of the sale of the Hollywood store. Appellant and Barnett testified that the business was purchased with appellant's personal funds. According to some of the evidence Barnett was in charge of the store after the purchase as manager for appellant. Respondent testified that he conducted it as his own personal business. The attorney who acted as escrow holder when the sale was made testified that his dealings were with Barnett and that the latter stated that "he was starting this business and he was going to put it in his father's name." The finances of the business were handled through the bank account which is in controversy here. Appellant testified that the profit from the business in 1944 amounted to $7,000 which he gave to Barnett. Appellant knew nothing about the operation of the store; he did not know the amount of the sales made for cash and the amount on credit; he never paid social security tax, unemployment insurance or compensation insurance. Barnett hired and discharged the employees and paid bills for gas, electricity and other expenses of the business. Further evidence that appellant held merely the legal title to the property and was not the real owner is set forth in a subsequent subdivision of this opinion.

Appellant maintains that by reason of the contradictions found in respondent's testimony and by reason of the evidence given by other witnesses respondent is unworthy of belief and that there is no credible evidence sustaining the finding that community funds were used to purchase the business which stands in appellant's name.

[1-4] It is not our purpose to analyze the conflicts in the evidence. The trial court had the opportunity of observing the witnesses, a privilege that is denied to us, and determined the facts from the evidence. At the close of the trial, in announcing the terms of the judgment, the court said: "There is not any question but what there has been a lot of perjury in this case." The record supports this declaration and the findings establish the source of the perjury as viewed by the trial judge. Following the quoted statement the court announced its conclusion that the property involved is the community property of plaintiff and Barnett. It is not within our province to weigh the evidence but we must view it most favorably to respondent. The general rule is that the findings of the trial court will not be disturbed on appeal if the record discloses substantial evidence to support them, and all intendments are in favor of the judgment. California Employment Comm. v. Betthesda Foundation, 54 Cal. App.2d 348, 350, 128 P.2d 874; Morrison v.

Willhoit, 62 Cal.App.2d 830, 836, 145 P.2d 707. Since the finding that appellant holds title to the community property in trust for respondent and her husband is sustained by substantial evidence, any conflicting evidence will be disregarded. Buckhantz v. R. G. Hamilton & Co., 71 Cal.App.2d 777, 779, 163 P.2d 756 and cases cited: Berger v. Steiner, 72 Cal.App.2d 208, 213, 164 P.2d 559; Estate of Isenberg, 63 Cal.App.2d 214, 216, 146 P.2d 424; Estate of Bristol, 23 Cal. 2d 221, 223, 143 P.2d 689. There is substantial evidence, though contradicted, sustaining the finding that the business, the lease, and the bank account are community property, and that appellant holds the same in his name as trustee for respondent and her husband.

2. Should the court have established a trust in favor of respondent? The allegation in the original complaint for separate maintenance is that Barnett had placed all the community property in the name of his father in order to defeat the claims of judgment creditors. In the amended complaint for divorce, filed after the trial had been completed, it is merely alleged that the community property stands in the name of appellant but that he has no right, title or interest therein other than the naked legal title as trustee for plaintiff and her husband, no reference being made to the reason or purpose for his so holding it. The finding of the court is in accord with the allegations in the amended complaint. There is no finding that the property was placed in appellant's name for the purpose of avoiding the claims of creditors and there is no evidence that would have sustained a finding to that effect.

Respondent testified that when her husband gave the money to his father with which to purchase the Santa Monica store he, Barnett, stated to her that he could not have the business in his name on account of the bankruptcy and on account of his creditors. The record is devoid of evidence that Barnett had any creditors. If any claims on account of the Hollywood store remained unpaid they were against the corporation that had owned and operated it and not against him. In view of this circumstance the allegation in the original complaint to the effect that Barnett had placed the community property in his father's name to defeat the claims of judgment creditors was not a correct statement, although based on Barnett's assertion to that effect. The fact that no evidence was introduced that Barnett had any creditors furnishes the reason for omitting from the amended complaint any reference to creditors and for the failure of the court to find that Barnett's attempt to escape creditors' claims motivated appellant's trusteeship.

[5, 6] In order that a transferor of property be prevented from recovering it from the person to whom it had been transferred in trust not only must there be an intent to avoid claims of creditors but there must be enforceable claims. A mere intent without the presence of something on which the intent may operate is not sufficient. The intent to avoid creditors' claims and the actuality of the claims must coexist. Before the court will deny relief on the ground that a trust was created for the purpose of defrauding creditors there must be proof of a claim which was intended to be defeated. Alaniz v. Casenave, 91 Cal. 41, 47, 27 P. 521. In 1 Restatement of the Law of Trusts, the rule is stated in section 63 to be that an intended trust is invalid if the purpose of the settlor in creating it is to defraud his creditors or other persons. In the comment following that section it is said (p. 200) that if a transfer of property is made for the purpose of preventing the enforcement of a claim against the property and the claim could not have been enforced, although the transferor believed that it could be enforced, the transferor can compel the transferee to perform the trust; and if a person, believing that he is liable on a claim, transfers his property to another who agrees to hold it in trust for him, and the purpose of the transfer was to prevent a third person from attaching the property, the transferor can compel the transferee to reconvey the property if, in fact, he was not liable to the third person although he believed he was liable.

An analogous illustration of the necessity for the concurrence of intent and an object on which the intent may operate is where a person, with the intent to avoid creditors' claims, transfers property that is exempt from the payment of debts and therefore could not be levied upon to satisfy the indebtedness, the transfer is not fraudulent since creditors have no interest in such property and are not hindered or delayed by the conveyance. Rossow v. Peters, 277 Ill. 436, 115 N.E. 524, 525; Bogan v. Cleveland, 52 Ark. 101, 12 S.W. 159, 20 Am.St.Rep. 158; Washburn v. Goodheart, 88 Ill. 229, 232; Moore v. Flynn, 135 Ill. 74, 25 N.E. 844, 846; 1 Restatement, Trusts, 200.

[7] Since there is no evidence that Barnett had any creditors, although he may have believed that there were claims against him, the trust was not invalid, and since for that reason the placing of the title to the community property in appellant was not prejudicial to the rights of others and was not an indicium or badge of fraud, the trust is enforceable by respondent as to her community share or interest in the property.

[8, 9] 3. The defense of the statute of limitations and laches. The Santa Monica store was purchased in the name of appellant in July, 1938. This action was commenced in January, 1945. Appellant pleaded in his answer and now contends that respondent's claim to the community property is barred by the provisions of subdivisions 3 and 4 of section 338 of the Code of Civil Procedure. A resulting trust originates under circumstances different from those that give rise to a constructive trust (3 Scott on Trusts, sec. 404.2) though the terms are loosely used without proper consideration for the facts from which the respective trusts derive. (Id., sec. 440.1.) Whatever may be the character of the trust here under consideration, respondent's claim is not barred by the statute. Until a trust is repudiated by the trustee the statute of limitations does not begin to run against a voluntary resulting trust (Cohn v. Cohn, 7 Cal.2d 1, 8, 59 P.2d 969; Leviston v. Tonningsen, 212 Cal. 656, 665, 299 P. 724; England v. Winslow, 196 Cal. 260, 271, 237 P. 542; Lamb v. Lamb, 171 Cal. 577, 581, 153 P. 913), or against a constructive trust (Forman v. Goldberg, 42 Cal.App.2d 308, 316, 108 P.2d 983; Cooney v. Glynn, 157 Cal. 583, 589, 108 P. 506; Cohn v. Goodday, 191 Cal. 615, 627, 217 P. 756), or an express trust. Title Ins. & Tr. Co. v. Ingersoll, 158 Cal. 474, 486, 111 P. 360; McClure v. Colyear, 80 Cal. 378, 380, 22 P. 175; MacMullan v. Kelly, 19 Cal.App. 700, 706, 127 P. 819. The statute does not begin to run against a continuing trust until there has been a demand and a refusal to act. Dillon v. Cross, 5 Cal.App. 766, 769, 91 P. 439.

[10, 11] There never had been a demand on appellant prior to the commencement of this action to account for or to convey the property to the rightful owners and he had never repudiated the trust until he filed his answer in the instant case. On the contrary, upon several occasions he acknowledged that the property belonged to his son. He said at one time to Barnett: "You will come to no good. A man in business cannot gamble. Why don't you take the business from my name? I don't want the business in my name. You will cause me headaches and trouble all the time." To a witness on another occasion: "The business does not belong to me and I wish he would put everything in his name and I would not have any headache." At another time he said in the presence of respondent that he did not want the business in his name and that "it was Barney's business," to which the latter replied: "Well, when the war is over I will make a corporation out of it, or I will take it off of your name." Again appellant said: "I wish he would take off from my head these headaches. This business is his; it does not belong to me."

Appellant never was in possession of the store. Barnett was in possession and conducted the business in the same manner as if he had always owned it. No one else ever had charge of it. The statute of limitations never runs in favor of a trustee as against the beneficiary while the latter is in possession of the property. Gilbert v. Sleeper, 71 Cal. 290, 294, 12 P. 172; McClure v. Colyear, supra, 80 Cal. at page 381, 22 P. 175; Wormouth v. Johnson, 58 Cal. 621, 624; Peixouto v. Peixouto, 40 Cal.App. 782, 786, 181 P. 830.

Inasmuch as Barnett was in possession and had sole charge of the business there appears to have been no reason for a demand by respondent that appellant transfer the legal title of the property to her and her husband. The occasion for such demand did not arise until conditions caused respondent to file this action and to advance her claim for a share of the community property.

[12, 13] Since no legal prejudice was caused to appellant by reason of the delay in making a demand, or by reason of the nonenforcement of the trust, the defense of laches is not available. Title Ins. & Trust Co. v. Ingersoll, supra. There are other sufficient reasons for the rejection of the doctrine of laches. It is not applied strictly between near relatives (Butler v. Hyland, 89 Cal. 575, 582, 26 P. 1108); it is without significance in the case of a resulting trust (Moultrie v. Wright, 154 Cal. 520, 526, 98 P. 257); it is not designed to punish a plaintiff and can be invoked only where the allowance of the claim would, because of the claimant's acts, result in an unwarranted injustice. "* * * it is never permitted to be invoked merely to aid a faithless trustee in consummating his wrong." Hovey v. Bradbury, 112 Cal. 620, 625, 44 P. 1077, 1078.

[14] 4. Should appellant be allowed credit for money expended by him in the operation of the business? Appellant claims to have advanced several thousand dollars of his personal funds for improvements in the store and for merchandise purchased for which he is entitled to credit before a division of the property is made between respondent and Barnett. This point was raised in the appellant's opening brief and not answered by respondent. The mere fact that the question was not discussed in respondent's brief is not, as claimed by appellant, a reason for allowing his demand. The cases referred to in his closing brief do not support his contention that respondent, by failing to reply, has confessed the point. The cited case of Campbell v. Ingram, 37 Cal.App. 728, 731, 174 P. 366, states the familiar rule that a finding is not required upon facts that are admitted in the pleadings. Atwood v. Hammond, 4 Cal.2d 31, 46, 48 P.2d 20, also relied on by appellant, refers to a statement of fact contained in the brief of one party and not controverted by the other, and the court accepted such statement as true. The decision does not hold that a point of law contended for by one litigant and not answered by the other must be adopted by the court as correct.

[15, 16] Appellant did not plead in his original answer that he had made any advancements on account of the business but contented himself with a denial of the allegations contained in the complaint. At the conclusion of the trial, by leave of court, he filed an amended answer to conform to the proof, and again failed to plead his claim for expenditures. Since he rested his case upon the defense that there was no trust and that he was the sole owner of the business, and since we have found his defense to be without merit, he cannot claim reimbursement from respondent for any portion of his personal outlay. The case of Wright v. Chilcott, 61 Or. 561, 122 P. 765, cited by appellant, so holds, although in that case upon special petition therefor by the trustee of a resulting trust the case was, with apparent reluctance on the part of the Supreme Court, remanded to the trial court with directions to permit him to file a supplemental answer showing the value of the permanent improvements that he had placed on the property. In the instant case the evidence of appellant's expenditures in connection with the business was admissible in furtherance of his claim to ownership and in opposition to respondent's demand for her community interest. From the state of the pleadings the evidence may be considered to have been received for that purpose since the court did not make a finding as to the validity of the claim now asserted. The other cases on which appellant relies do not sustain his demand for reimbursement in the absence of a pleading that would have afforded an opportunity to respondent to controvert his claim. In Woodard v. Wright, 82 Cal. 202, 22 P. 1118, the defendant, who was held to be the agent and trustee for the plaintiff, pleaded in his answer the amount he had expended on the property while under his control. In Stromerson v. Averill, 22 Cal.2d 808, at page 816, 141 P.2d 732, the opinion refers to the conflicting claims of the parties, the assumption by the trustee of personal liability on a contract of purchase and outstanding obligations and expenditures that may have been made by one party for the benefit of the other in relation to their joint farming obligations, upon which an accounting was required in order to do complete equity, but the opinion does not

disclose whether or not those matters were pleaded.

[17] Since appellant failed, both in his original answer and in his amended answer to conform to the proof, filed after the evidence of his expenditures had been introduced, to make any allegation upon which the court could base a finding that he was entitled to credit, his claim therefor cannot be allowed on appeal.

The judgment disposed of all conflicting claims presented by the pleadings and it is affirmed.

MOORE, P. J., and McCOMB, J., concur.

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76 Cal.App.2d 877

ARNOLD v. ARNOLD.

Civ. 15327.

District Court of Appeal, Second District, Division 2, California.

Nov. 22, 1946.

1. Appeal and error 🔑1170(1)

Whether or not an error complained of has produced substantial injury to appellant is a matter for consideration by the reviewing court. Const. art. 6, § 4½.

2. Appeal and error 🔑1170(1)

A judgment should not be reversed on account of errors that do not appear to have caused injury or prejudice to the appellant, or unless a condition has been shown to exist from which an inference of possible prejudice might be drawn. Const. art. 6, § 4½.

3. Appeal and error 🔑1170(10)

A judgment will not be reversed on account of an erroneous finding against an appellant that is not necessary to sustain the judgment. Const. art. 6, § 4½.

4. Divorce 🔑252

Where the acts of cruelty are of a flagrant character and have extended over a long period of time the portion of the community property awarded to the innocent party should be greater than if the acts were more trivial yet sufficient to warrant the granting of a divorce. Civ.Code, §§ 139, 146, 148.

5. Divorce 🔑252

Where divorce is granted on the more heinous ground of adultery as well as for extreme cruelty the amount awarded to the innocent party should be greater than if granted on the ground of cruelty alone. Civ.Code, §§ 139, 146, 148.

6. Divorce 🔑51

Improper conduct of husband, after a reconciliation, operated to revoke wife's condonation of husband's past conduct and revived wife's original causes of action for divorce, both for extreme cruelty and adultery. Civ.Code §§ 115, 117, 121.

7. Divorce 🔑286

Where the court properly granted wife a divorce together with custody of minor child, but the error in failing to find that husband's acts, following reconciliation, did not operate to revoke wife's condonation of husband's prior conduct resulted in awarding to the wife only an equal division of the community property, such error required reversal of portion of decree as to division of the property. Civ.Code §§ 115, 117, 121, 146, 148; Const. art. 6, § 4½.

8. Divorce 🔑240(2)

Where a wife who was granted a divorce was 52 years of age and was not able to support herself or resume her former profession of nursing and only possessed such property as was given to her by the decree, the court was required to give proper consideration to all such facts in the award of support and in determining the time during which it should continue. Civ.Code §§ 139, 146, 148.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Joseph V. Arnold against Margaret R. Arnold for divorce on ground of extreme cruelty, wherein defendant filed a cross-complaint seeking divorce. The court awarded defendant a decree of divorce, together with custody with a minor child, maintenance of $100 per month for the support of the child, and decreed an equal division of community property. From the whole of the decree, except those portions granting her a divorce and awarding the custody of the child to her, the defendant appeals.

Portions of decree appealed from reversed.

Tripp, Callaway, Sampson & Dryden, of Los Angeles, for appellant.

Hahn, Ross & Goldstone, of Los Angeles, for respondent.

WILSON, Justice.

Plaintiff commenced this action for divorce charging his wife with extreme cruelty. She answered denying plaintiff's complaint and at the same time filed a cross-complaint alleging he had been guilty of acts constituting extreme cruelty and that within two years preceding the filing of the cross-complaint he had committed adultery with the corespondent who was named but did not answer. Plaintiff denied the allegations of cruelty and adultery and as a separate defense to the cross-complaint alleged that he and defendant separated from each other about September 1, 1944; that thereafter he made a full and complete confession of his association and acts of adultery with the corespondent; that after his confession the parties negotiated a reconciliation whereby defendant forgave and condoned all matters which had brought about the separation, including plaintiff's acts of adultery.

Findings were made and an interlocutory decree of divorce was granted to defendant specifically reciting that she was entitled to a divorce from plaintiff on the ground of cruelty as alleged in her cross-complaint. The decree awarded the custody of the minor daughter of the parties to defendant, required plaintiff to pay to defendant as and for the support and maintenance of said minor the sum of $100 per month until the latter should reach the age of 21 years and no longer, and decreed that all community property, including property conveyed by plaintiff to defendant at the time of the reconciliation, should be sold at the highest market price and the proceeds divided equally between the parties, unless they should within ten days after entry of the decree divide the property between themselves on such basis as they saw fit.

Defendant has appealed from the whole of the interlocutory decree except those portions granting her a divorce and awarding the custody of the minor child to her. She has assigned as grounds for reversal of the decree several errors in the findings.

[1-3] Whether or not an error complained of has produced substantial injury to an appellant is a matter for consideration by the reviewing court. Peters v. Peters, 156 Cal. 32, 37, 103 P. 219, 23 L.R.A.,N.S., 699. A judgment should not be reversed unless, after an examination of the entire record, the court shall be of the opinion that the error resulted in a miscarriage of justice, Const., Art. VI, sec. 4½, nor should it be reversed on account of errors that do not appear to have caused injury or prejudice to the appellant, or unless a condition has been shown to exist from which an inference of possible prejudice might be drawn. Totten v. Barlow, 165 Cal. 378, 383, 132 P. 749; Edwards v. Wagner, 121 Cal. 376, 378, 53 P. 821; Peters v. Peters, supra. It must further appear that a different result would have been probable if an error had not occurred. Murnane v. Le Mesnager, 207 Cal. 485, 495, 279 P. 800. A judgment will not be reversed on account of an erroneous finding against an appellant that is not necessary to sustain the judgment. Miller & Lux Inc. v. Secara, 193 Cal. 755, 772, 227 P. 171; Risdon v. Steyner, 9 Cal.App. 344, 349, 99 P. 377; Young v. Young Holdings Corporation, Ltd., 27 Cal.App.2d 129, 154, 80 P.2d 723.

The errors which require a reversal of the judgment in this action are not such as are contemplated in the constitutional provision or in the cases above cited. The errors in the findings to which we shall refer have resulted in substantial injury to appellant in that findings that are required by the evidence, if they had been made, would have resulted as a matter of law in the assignment to her of a greater share of the community property than that awarded by the decree, and a more liberal award of support would have been warranted.

1. The error in failing to find that the condonation had been revoked and in finding that defendant did not have cause for its revocation. The applicable sections of the Civil Code are as follows: Section 115: "Condonation is the conditional forgiveness of a matrimonial offense constituting a cause of divorce." Section 117: "Condonation implies a condition subsequent; that the forgiving party must be treated with conjugal kindness." Section 121: "Condonation is revoked and the original cause of divorce revived: 1. When the condonee commits acts constituting a like or other cause of divorce; or, 2. When the condonee is guilty of great conjugal unkindness, not amounting to a cause of divorce, but sufficiently habitual and gross to show that the conditions of condonation had not been accepted in good faith, or not fulfilled."

Respondent contends that since the decree of divorce was granted to appellant on the ground of cruelty, and since when a divorce is granted on that ground the power of the court to apportion the community property is the same as when granted on the ground of adultery, she did not suffer any substantial injury by reason of the failure of the trial court to assign the latter ground as an additional reason for the decree in her favor. The fallacy of this argument will appear in the discussion which follows.

[4, 5] The rule drawn from the cases hereinafter cited is that the greater the offense the larger the proportion of the community property that must be awarded to the innocent spouse;—where the acts of cruelty are of a flagrant character and have extended over a long period of time the portion of the community property awarded to the nonoffending party should be greater than if the acts were more trivial yet sufficient to warrant the granting of a divorce. It obviously follows that where the divorce is granted on the more heinous ground of adultery as well as for extreme cruelty the amount awarded to the innocent party should be greater than if granted on the ground of cruelty alone.

The acts of cruelty committed by respondent were many and had continued over a period of years. He was intoxicated on frequent occasions both at home and when he attended social gatherings with his wife; his amorous and indecent advances to other women caused embarrassment to her; he used profane language in the presence of their daughter as well as when they were alone; he confessed to his wife and freely admitted on the witness stand that he had committed adultery with the corespondent on numerous occasions over a period of approximately two years.

In September, 1944, the parties became reconciled and resumed their marital relations. There is serious doubt, as appears from the evidence, whether respondent was even at that time sincere in his expressed desire to live the life of a normal married man, or whether his plea for forgiveness and his promise to cease his unconventional activities were prompted by his desire to obtain possession of $9300 that appellant had removed from their safe deposit box because she feared that it might fall into the hands of the corespondent. Whatever may have been the actual reason in his mind his unregeneracy is attested by the fact that almost immediately after the reconciliation and the return of the money to him he renewed his cruel treatment, abused appellant in the presence of other persons, criticized her religious faith, and was intoxicated on several occasions. In the following December, while in an intoxicated condition at a social gathering, his actions were objectionable in the extreme, humiliating appellant in the presence of their friends. At about the same time appellant found in his pocket an article that is used in sexual intercourse which justifiably caused her to assume that his adulteries had not ceased. His fatuous explanation that he had found the article in a box in the basement does not furnish a legitimate reason for his carrying it in his pocket.

[6] Appellant's condonation of respondent's past offenses was upon the statutory condition that she should thereafter

be "treated with conjugal kindness." By reason of the acts of respondent occurring after the reconciliation, only a brief outline of which has been given, the condonation effected in September was revoked. In the latter part of December, at the time of the occurrences last mentioned, appellant separated from respondent and they have not since lived together. The revocation of the condonation revived the original causes of action for divorce, both extreme cruelty and adultery. (Neeley v. Neeley, 179 Cal. 232, 234, 176 P. 163; Andrews v. Andrews, 120 Cal. 184, 188, 52 P. 298; Mayo v. Mayo, 3 Cal.2d 51, 57, 43 P.2d 535; Brewthauer v. Brewthauer, 45 Cal.App. 759, 763, 188 P. 296; Broderick v. Broderick, 40 Cal.App. 550, 555, 181 P. 402; Bennett v. Bennett, 48 Cal.App. 670, 673, 192 P. 180.)

[7] The evidence does not sustain the finding that appellant did not have any reason or cause for the revocation of the condonation, but shows unmistakably the contrary. The court erred in finding as it did and erred in failing to find that the condonation had been revoked by reason of the failure of respondent to accord to appellant the conjugal kindness required by law, which was the consideration of the condonation, and by reason of his subsequent repudiation of his marriage vows.

The significance and importance of the failure of the court to find in accord with the evidence will become apparent in the discussion of the next error assigned by appellant, to wit, the equal division of the community property.

2. The error in dividing the community property equally between the parties. This error follows as the result of the previous error in finding that the condonation had not been revoked. The court apparently took into consideration only the acts of cruelty committed during the short period between the reconciliation and the final separation, which were few in comparison with those preceding the condonation. Since the condonation was revoked and since the divorce should have been granted to appellant on both grounds charged in her cross-complaint, everything that had occurred both before and after the reconciliation, the long continued cruel conduct of respondent and his two years of adulterous relations with the corespondent, should have been given weight in determining the division of the community property. In view of respondent's unquestioned and admitted misconduct the court erred in making an equal division. Appellant was entitled to much more than one half.

The general rule is that where a divorce is granted on the ground of extreme cruelty or adultery, or both, the nonoffending party should be awarded more than one half of the community property. Quagelli v. Quagelli, 99 Cal.App. 172, 176, 277 P. 1089; Nave v. Nave, 35 Cal.App. 27, 28, 169 P. 253; Tipton v. Tipton, 209 Cal. 443, 444, 288 P. 65; Falk v. Falk, 48 Cal.App.2d 762, 770, 120 P.2d 714; Gorman v. Gorman, 134 Cal. 378, 379, 66 P. 313; Thomsen v. Thomsen, 31 Cal.App. 185, 188, 159 P. 1054. In each of the cases of Brown v. Brown, 60 Cal. 579, 580, and Eslinger v. Eslinger, 47 Cal. 62, 64, it was held that the innocent party was entitled to three fourths of the community property and the decrees of the trial courts which had awarded only one half were accordingly modified. In Nave v. Nave, supra, and in Strozynski v. Strozynski, 97 Cal. 189, 193, 31 P. 1130; one half had been awarded in each case by the trial court and the decrees were so amended as to give to the nonoffending party all the community property. In Eidenmuller v. Eidenmuller, 37 Cal. 364, where the wife was granted a divorce on the ground of extreme cruelty, the court said that the conduct of the plaintiff wife was not free from fault but nevertheless affirmed a decree which awarded all the community property to her, modifying it only by reducing the amount ordered to be paid for her support and that of the child. Awards of more than one half of the community property to the innocent party were affirmed in Gorman v. Gorman, 134 Cal. 378, 66 P. 313, where the decree was on the ground of extreme cruelty and the innocent party was awarded seven twelfths; in White v. White, 86 Cal. 219, 24 P. 996, where the decree was on the ground of the adultery of the husband

and all the community property was awarded to the wife; in Shapiro v. Shapiro, 127 Cal.App. 20, 14 P.2d 1058, the wife having been granted a decree on the ground of extreme cruelty, with an award of "a larger share" of the community property; and in Knapp v. Knapp, 23 Cal.App. 10, 136 P. 719, in which the wife was awarded substantially more than half.

Section 146 of the Civil Code provides that in case of the dissolution of a marriage, if the decree be rendered on the ground of adultery, incurable insanity, or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts in the case and the condition of the parties, may deem just, and if rendered on any other ground it shall be equally divided between the parties. This section standing alone commits the division of the community property to the discretion of the trial court where a divorce is granted on the ground of either cruelty or adultery, but section 148 provides that such division "is subject to revision on appeal in all particulars, including those which are stated to be in the discretion of the court." The last section provides a statutory exception to the general rule that an appellate court will not revise an order or a judgment rendered in the exercise of discretionary power unless discretion has been abused, and the cases hereinbefore cited wherein decrees were modified furnish examples of the exercise of the appellate revisory power.

Since the case must be retried we refrain from exercising our jurisdiction to modify the decree by awarding appellant the share to which she is entitled, but entrust the duty to the trial court to divide the property justly in such proportions as the evidence shall warrant, not contrary to the manner indicated in this opinion.

We have not overlooked the evidence pointed out by respondent of unladylike language used and acts committed by appellant on several occasions. The record shows that in practically every instance such acts were provoked by the reprehensible and inexcusable conduct and language of respondent.

[8] 3. The error in failing to make a suitable award to appellant for her support. One paragraph of the decree orders respondent to pay to appellant "as and for the support and maintenance of" their minor daughter the sum of $100 per month until she shall reach the age of 21 years. Another paragraph orders the payment of $100 per month until she shall reach the age of 21 years, at which time all payments to appellant shall cease permanently, and "that this is a part of the award to the defendant and not as alimony in any sense and the plaintiff shall have the right to compute and pay the same in a lump sum which shall be in any event in addition to the amount received by the defendant in the division of the community property."

Section 139 of the Civil Code provides that where a divorce is granted for an offense of the husband the court may compel him to provide for the maintenance of the children of the marriage and to make a suitable allowance to the wife for her support during her life, or for a shorter period, as the court may deem just, "having regard to the circumstances of the parties respectively." The theory of this requirement is that the husband entered upon an obligation which bound him to support his wife during the period of their joint lives, that by his own wrong he has forced her to sever the relation which enabled her to compel the performance of this duty, and that he is required to make compensation for the offense committed by him which has deprived her of the benefit of the obligation. In re Spencer, 83 Cal. 460, 464, 23 P. 395, 17 Am.St.Rep. 266; Honey v. Honey, 60 Cal.App. 759, 761, 214 P. 250. A woman past middle age can seldom rehabilitate herself after a break in marriage relations and the courts may properly safeguard her financial future where the marriage is dissolved for the offense of the husband. Farrar v. Farrar, 41 Cal.App. 452, 457, 182 P. 989.

Appellant is entitled to adequate support for herself unconditioned on her daughter's age. She is 52 years old, not in robust health, has been married to respondent for 20 years, and is without property except that awarded to her by the decree. She is not able to support herself. She was a nurse before marriage but is not now able to resume such work because she has not kept herself informed of the changes and improvements in the technique of the profession, and has not the physical ability to do the lifting required when caring for patients. She has passed the age in life when she is able to prepare herself for a new profession or to engage in active business. These facts must be given proper consideration in the award of support and in determining the time during which it shall continue.

4. The error in failing to find that respondent's life insurance policies were community property. Since respondent concedes in his brief that the evidence shows that the premiums on his life insurance policies were paid out of community funds and earnings and that their value should be divided between the parties, and since he offers to include the value of the policies when the actual division of the community property is made, nothing need be said other than that the court erred in failing to make an appropriate finding in accord with the evidence and to dispose of the cash surrender value of the policies by the decree.

Those portions of the interlocutory decree of divorce appealed from are reversed.

MOORE, P. J., and McCOMB, J., concur.

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77 Cal.App.2d 169

BURTON v. BURTON.

Civ. 15314.

District Court of Appeal, Second District,
Division 1, California.
Dec. 5, 1946.

Divorce ⚷167

Evidence sustained judgment for defendant in action by husband to vacate interlocutory judgment for divorce almost one year after entry thereof on ground that parties lived together as man and wife during pendency of divorce action and at time interlocutory decree was entered.

◆

Appeal from Superior Court, of Los Angeles County; Frank M. Smith, Judge.

Action by Royal E. Burton against Dorothy C. Burton to vacate an interlocutory judgment for divorce. From a judgment for defendant, plaintiff appeals.

Judgment affirmed.

George Stahlman, of Los Angeles, for appellant.

Rupert B. Turnbull, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from the judgment for defendant in an action seeking to vacate an interlocutory judgment for divorce.

The action herein was filed March 22, 1945; the interlocutory decree was entered March 27, 1944. It is alleged that the parties lived together as man and wife during the pendency of the divorce action and at the time the interlocutory decree was entered; that plaintiff herein was deceived and misled.

It is contended on appeal that plaintiff's conduct in the divorce action constituted extrinsic fraud; that "there was a valid reconciliation which vitiated the proceedings for divorce"; and, "that there has been more than a slight showing of facts", by plaintiff and appellant herein, "justifying the setting aside of the default divorce."

In the trial of the within action the court found against plaintiff, the appellant herein. Although the evidence is conflicting, it is sufficient to sustain the findings. Such conclusion disposes of appellant's other contentions above mentioned.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

76 Cal.App.2d 836

CALIFORNIA CASUALTY INDEMNITY EXCHANGE v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 15502.

District Court of Appeal, Second District, Division 3, California.

Nov. 20, 1946.

Hearing Denied Jan. 16, 1947.

Workmen's compensation ⚷1549

Where undisputed evidence was that aggravation of tuberculosis resulting in death was not due to dust or fumes but to failure of employee to remain in bed there was no injury that arose out of the employment that warranted death benefits. Labor Code, §§ 114, 115, 3201 et seq., 3600.

Proceeding by the California Casualty Indemnity Exchange for a writ of review to review and annul an award made by the Industrial Accident Commission of the State of California to Margaret G. Thompson and others as dependents of the late Andrew Roberts Thompson formerly employed by the Food Machinery Corporation.

Award annulled.

Oliver & Corfman, of Los Angeles, for petitioner.

R. C. McKellips and Edward A. Sarkisian, both of San Francisco, for respondents.

PER CURIAM.

The California Casualty Indemnity Exchange is the insurance carrier for Food Machinery Corporation and seeks by means of a writ of review to annul an award made by the Industrial Accident Commission, Panel Two, (See secs. 114, 115, Labor Code, as amended 1945) in favor of the dependents of the late Andrew Roberts Thompson, formerly employed by the Food Machinery Corporation.

From the findings of fact appearing in the report of the referee who heard testimony we glean the following: That Mr. Thompson "while employed as a tank assembler on July 26, 1943 at Riverside, California by Food Machinery Corporation, a corporation, sustained injury arising out of and occurring in the course of his employment, consisting of the occupational aggravation into a disabling condition of a pre-existent non-disabling tuberculosis. * * * The date is hereby determined to be July 26, 1943, which is the date upon which the employee first had knowledge that the disability from which he was suffering was traceable to his employment.

"Said employee died on January 28, 1944, the cause of death being advanced bilateral pulmonary tuberculosis. * * *

"Said injury caused temporary total disability beginning July 26, 1943 to and including January 28, 1944, the date of death, entitling the employee to $25.00 per week during said time. The total period of time, after deducting the waiting period of seven days is 25⁴⁄₇ weeks, which is a total of $639.29. Said weekly benefit is based on maximum earnings.

"Applicant Margaret G. Thompson was a member of the employee's household in good faith.

"The applicants are entitled to the payment of or reimbursement for the reasonable value of self-procured medical treatment in an attempt to cure or relieve the employee from the effects of his injury.

"Said employee left surviving him, totally dependent, Ada P. Thompson and Roy Dale Thompson, the minor son of the parties, as well as Margaret G. Thompson, who are, in addition to the temporary total disability, entitled to a death benefit in the sum of $6000.00 payable at the rate of $25.00 per week beginning January 29, 1944, based upon maximum earnings.

"Ada P. Thompson is the natural mother of Roy Dale Thompson, a minor, and it is the judgment of this Commission that one-half of all benefits herein awarded should be paid directly to Ada P. Thompson for the benefit of herself and said minor child, to be received by her and disbursed in her discretion for such purpose, and the remaining one-half to Margaret G. Thompson.

"Statutory burial expense in a sum not to exceed $300.00 is payable to the person or firm entitled to receive the same. Jurisdiction is hereby reserved to determine the amount thereof and to whom payable in the event the parties are unable to agree thereon."

As a conclusion of law the referee determined that payments should be made to the dependents as indicated, and provided also for the payment of attorneys' fees.

When the report came before the Industrial Accident Commission sitting as Panel Two, it was adopted in its essential details by findings of fact entered by two members of the Panel and an award was made according to the recommendation, with a proviso that the two items of $3000.00 each, less the sum of $250.00 attorneys' fee, be paid to Ada Thompson and Margaret Thompson, respectively, in weekly installments of $12.50 each. It was also provided in the order that the defendants should make payment or reimbursement for the reasonable value of self-procured medical treatment, provision being also made for statutory burial expense in a sum not to exceed $300.00. The third member of the Panel dissented from the decision.

The application for adjustment of the claim in this case stated that Mr. Thompson "sustained injury arising out of and in the course of the employment, as follows: While working in assembly pit, assembling machinery and was exposed to dust and paint fumes resulting in infection of throat and lungs, and activating preexisting tuberculosis of the throat, larynx and lungs."

The only medical testimony produced at the hearing was given by Dr. Frank Porter Miller. He testified that he first saw Mr. Thompson on July 3d, 1943 when he was sent to him by Dr. Irwin Miller "and we X-rayed him at that time and that confirmed the diagnosis, and I am a little hazy as to what took place in those three weeks [following], whether he was thoroughly convinced of his tuberculous condition or not because he didn't go under active management until the 7th of August, 1944, [1943]. At that time we followed the invincible rule of placing him in bed. He had an extremely sore throat with considerable ulceration on either larynx. In addition to that he had rather wide-spred infection involving the upper two-thirds of either lung. As yet very little tissue destruction. He was placed in bed and was in bed continuously until his death. Treatment which we used was bed rest. He was given tuberculin and treatment to relieve the throat condition, which became progressively worse. The chest condition advanced a bit until it was only with great difficulty that he could swallow." He also testified that "as far as advanced manifestation of the disease, he would come under the classification laid down by the National Association as an advanced case because tuberculosis of the throat does not occur as an early manifestation," and further that "practically all of those cases have been active pretty nearly a year at least before they reach the point where they consult a physician." This same doctor furnished a written report on this case which was before the commission, in which he stated, "I can only reiterate from the conclusions that we formulated at the last hearing. It was alleged by the applicant that the dust and fumes were a predisposing factor to his tuberculosis. In that, I am not in accord, as I do not believe the dust and fumes which are around the assembly line are excessive and furthermore they do not predispose to this form of pathology.

"I do feel that there is one factor that should receive consideration. There is no question but what this man had an active tuberculosis for a number of months, antedating the cessation of work. It was my testimony at the hearing that the continuance of this work would naturally be an aggravating factor in his tuberculosis. In fact, for this condition to remain stationary or to improve, it would necessitate complete bed rest. Contrary to the bed rest is continuance on the job, which undoubtedly aggravated his condition."

In view of the statement of Dr. Miller that he did not believe that the dust and fumes constituted a predisposing factor to decedent's tuberculosis, counsel for the commission necessarily places his sole reliance for sustaining the decision of the Panel upon the closing paragraph of the report which we have just quoted. His argument fails, however, in the light of decisions heretofore reached in this State and elsewhere.

In George L. Eastman Co. v. Industrial Accident Commission, 1921, 186 Cal. 587, at page 594, 200 P. 17, at page 20, the court was considering a case in which an award of compensation was made by the Industrial Accident Commission and expressed itself as follows:

"If the disability, although arising from a chronic heart trouble, was brought on by any strain or excitement incident to the employment, the industrial liability still exists. Acceleration or aggravation of a preexisting disease is an injury in the occupation causing such acceleration. [Cases.] It can hardly be doubted under this rule that if decedent's incapacity to drive his truck was caused by a heart attack brought on by exertion or sudden shock or excitement incident to his employment on the highway, recovery could be had.

"Where, however, the proximate and immediate cause of the injury is from disability arising solely from an idiopathic or subjective condition, the weight of authority, including the decisions of this state, are against recovery, though the injury clearly occurs in the course of employment. [Citing Brooker v. Industrial Acc. Comm., 176 Cal. 275, 168 P. 126, L.R.A. 1918F, 878, and cases from other jurisdictions.]

"It will be noticed in all of these cases the injury or death was the direct result of a fall induced by some subjective condition of the injured party, and without any intervening or contributing cause connected with the employment."

In Madore v. New Departure Mfg. Co., 1926, 104 Conn. 709, 134 A. 259, 264, the Supreme Court of Connecticut set aside an award in favor of plaintiff, remarking upon the impossibility of finding "A causal relation between the tuberculosis and the employment of the claimant. It did not cause it; he already had it. It did not aggravate or accelerate it in any other way than any other form of similar exertion would have done. The employment was not the proximate cause of the tuberculosis, and in no legal sense did it proximately contribute to it. The coincidence of the employment and the tuberculosis will not support an award, in the absence of the causal connection between the tuberculosis and the employment evidencing that the disease did arise out of the employment." This declaration was made by the court, following a statement reading as follows: "Neither the grinding, nor the work done by him, was the cause of his tuberculosis. The exposure in his employment, tending to light up or aggravate tuberculosis, was no greater, nor different in character, from that to which factory workers generally were subjected. The claimant's present condition is the natural development of the disease; any labor would have brought him to the condition he is now in, and the development of the disease has not been affected by his work any more than it would have been by the same amount of work in any other occupation." In the cited case the court refers to a decision reached in another Connecticut case, Longobardi v. Sargent & Co., 100 Conn. 383, 392, 124 A. 13, 17, where the court said [104 Conn. 709, 134 A. 261]: "'The vice of plaintiff's argument is that he ignores these findings of fact, and emphasizes the other facts found that he suffered from progressive heart disease, and also that during the same period he was at work, as equivalent to establishing a causal relation between the work and the disease, that is, speaking generally, because these facts were concomitant they were necessarily correlative, an ever recurring fallacy which lies at the foundation of much erroneous reasoning. As we have just seen, the finding in the case is that there was no causal relation between his malady and his work.'" Reference is also made to Madden's Case, 222 Mass. 487, 494, 111 N.E. 379, 383, L.R.A.1916D, 1000. There Chief Justice Rugg, discussing features of the Workmen's Compensation Act of the Commonwealth of Massachusetts, took occasion to say (222 Mass. 487, 111 N.E. 382, L.R.A.1916D, p. 1004): "It does not afford compensation for injuries or misfortunes, which merely are contemporaneous or coincident with the employment, or collateral to it. Not every diseased person suffering a misfortune while at work for a subscriber is entitled to compensation.

The relief is so new that the tendency may be to inquire only as to the employment and the injury and to assume that these two factors constitute ground for compensation. But the essential connecting link of direct causal connection between the personal injury and the employment must be established before the act becomes operative. The personal injury must be the result of the employment and flow from it as the inducing proximate cause. The rational mind must be able to trace the resultant personal injury to a proximate cause set in motion by the employment and not by some other agency, or there can be no recovery. In passing upon this question, an humanitarian emotion ought not to take the place of sound judgment in the weighing of evidence. The direct connection between the personal injury as a result and the employment as its proximate cause must be proved by facts before the right to compensation springs into being. A high degree of discrimination must be exercised to determine whether the real cause of an injury is disease or the hazard of the employment. A disease which under any rational work is likely to progress so as finally to disable the employé, does not become a 'personal injury' under the act merely because it reaches the point of disablement while work for a subscriber is being pursued. It is only when there is a direct causal connection between the exertion of the employment and the injury that an award of compensation can be made. The substantial question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause. In the former case, no award can be made; in the latter, it ought to be made."

The conditions imposing liability under the California Workmen's Compensation Act (Div. IV, Labor Code) do not differ materially from those obtaining under similar acts which are operative in Massachusetts and Connecticut from which we have quoted in this opinion. The conditions, so far as they are pertinent to the present discussion, are set forth in section 3600, Labor Code, in the following language (p. 181): "Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as provided in section 3706, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur: (a) * * * (b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment. (c) Where the injury is proximately caused by the employment, either with or without negligence. * * * (d) * * * (e) * * *."

In the instant case it appears that the work performed by Mr. Thompson consisted of assembling tanks for the Food Machinery Corporation, and the question properly before the commission was whether out of that employment and incidental thereto there arose the acceleration of the disease from which he was suffering. Judging from the testimony of Dr. Miller the aggravation was not attributable either to dust or fumes but to the failure of Mr. Thompson to remain in bed from April, 1943, when he was first employed, until the following July, when he was forced to quit work. During that period Mr. Thompson did not know that he was afflicted with tuberculosis and it was perfectly natural for him, therefore, to continue on the job without adopting any remedial or preventive treatment, but that continuance arose out of his desire to work and not out of his employment nor was it incidental thereto. Since there was no evidence before the commission that dust or fumes caused the further impairment of Mr. Thompson's health and since we can find in the record no other cause which arose out of his employment and in the course thereof, we are constrained to annul the award which was made by the commission. It is so ordered.

Hearing denied; GIBSON, C. J., and SHENK and CARTER, JJ., dissenting.

76 Cal.App.2d 887

TABATA v. MURANE.

Civ. 15413.

District Court of Appeal, Second District,
Division 3, California.

Nov. 22, 1946.

Rehearing Denied Dec. 18, 1946.

Hearing Denied Jan. 20, 1947.

1. Evidence 🔑354(2)

Notations made over a period of years upon 12 separate sheets of paper taken from plaintiff's supply of billheads, which he used for billing his customers, and which had never been bound together in substantial or permanent form, although they had been stapled together, presumably in preparation for trial, were not an account of transactions between plaintiff and others nor entries in a "book of account" and the sheets did not become an "account book" so as to make entries therein admissible as an exception to the hearsay rule.

See Words and Phrases, Permanent Edition, for all other definitions of "Account Book" and "Book of Account".

2. Evidence 🔑354(2)

The presumed authenticity of entries made in a book of account in the regular course of business, which makes them admissible under an exception to the hearsay rule, is derived from the permanent nature of the record, hence, notations made upon loose sheets of paper are not accorded presumption of accuracy and reliability and are not admissible as books of account.

3. Account, action on 🔑3

An "account" may consist of charges alone if there are no credits to enter.

See Words and Phrases, Permanent Edition, for all other definitions of "Account".

4. Account, action on 🔑22

An account, to be admissible for purpose of establishing a cause of action on an open book account, must be shown to have been accurately kept and it must be so complete as to show the balance of indebtedness due from one party to the other.

5. Executors and administrators 🔑449

Where plaintiff's cause of action against decedent's estate was for recovery of balance claimed to be due upon an open book account and did not amount to a cause of action for money loaned, so that, if plaintiff failed to prove a book account, he could not recover upon some other cause of action, memoranda which was insufficient to establish a book account was inadmissible, notwithstanding that it might have been admissible as a record kept in the regular course of business if offered for some other purpose. Code Civ. Proc. § 1953f.

6. Executors and administrators 🔑449

In action against decedent's estate to recover on an open book account, where memoranda offered was insufficient to establish a book of account, court properly excluded plaintiff's canceled checks and evidence as to application of checks upon decedent's debts to other persons, which evidence could not supply defects in proof of book of account and could only have tended to verify entries in account once it was established.

7. Appeal and error 🔑1056(6)

Where, if all of plaintiff's offered evidence had been received, it would have been insufficient in law to support a verdict in his favor and it would have been error for court to deny motion for judgment of nonsuit, judgment for defendant was affirmed.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by George S. Tabata against Millard Murane, executor of the estate of Charles W. Zorn, deceased, to establish a creditor's claim against the estate. From a judgment for defendant, plaintiff appeals.

Affirmed.

Russell H. Pray, of Long Beach, John Y. Maeno, of Los Angeles, and Samuel J. Nordorf, of Long Beach, for appellant.

Tudor Gairdner and Frederick M. Kraft, both of Los Angeles, for respondent.

SHINN, Justice.

This action was brought against Murane as executor to recover the sum of $21,115.62 claimed to be the balance owed by Charles W. Zorn, deceased, upon an open book account, the executor having rejected plaintiff's claim. The complaint originally contained causes of action for money loaned and for money had and received, but these were dismissed after the decision upon a former appeal in the same action. Tabata v. Murane, 24 Cal.2d 221, 148 P.2d 605.

Plaintiff testified that he had been for many years a commission merchant handling the crops of vegetable growers and that he financed the raising of crops as a part of his business. He offered in evidence as his account book 12 long, narrow sheets of paper which had been stapled together at the top and were in the form of billheads, having across the upper portion four horizontal lines, the top one containing the figure "19" intended as a partial date, the second the initial "M," the third line the word "To" at the beginning of the line and at the end the letters "Dr." The fourth line contains the word "terms" and below that, "billheads." Below were some 35 lines upon which the names of various persons, mostly Japanese, had been written, with a date appearing before each name and an amount, presumably representing dollars and cents, following it. Some names appeared many times and the total of the entries approximated 400. The dates ran from 1931 to 1939. Plaintiff's name did not appear on any of the sheets, nor did the name of the decedent, Charles W. Zorn. The letters "C," "C.W.," or "C.W.Z." appeared many times but there was nothing more than these initials to indicate that the entries were intended to identify Mr. Zorn. The entries under these initials bore dates over a period of more than five years, commencing in 1935. Nothing was written upon the four upper lines other than the word "loan" which appeared upon about half of the sheets on the line which contained the words "To" and "Dr." The evidence of plaintiff was that all entries related to debits; none of them was designated on the sheets as a credit. The charges against decedent amounted to $21,115.62, without any credits on the alleged loans.

In an effort to prove that the 12 sheets constituted a book of account, plaintiff testified: "These are my book accounts; I kept track of the loans I made. * * * These are pages taken from my loan account ledger. * * * This is my loan ledger account." He further testified that the sheets were kept in the regular course of his business as a wholesale commission merchant, that he did all his own bookkeeping, that the names and figures on the sheets were in his own handwriting and were entered within a week of the transactions to which the entries related, from memos which he had made or from the stubs of his check book, and that he had destroyed the memos but had retained the check stubs and cancelled checks. Defendant objected to the introduction of the 12 sheets upon the grounds that they did not constitute a book account, were not shown to have been truly and correctly kept, and upon other grounds, and this objection was sustained.

Plaintiff also produced numerous cancelled checks drawn by him, some of which were payable to Charles W. Zorn or C. W. Zorn and which bore his endorsement, and others of which were payable to Security-First National Bank, the Bank of America, Prudential Insurance Company of America, or the County Tax Collector. He made offers of proof that decedent was indebted to the two banks and the insurance company, that the checks to them were applied on the several debts, and that the checks to the County Tax Collector were in the amounts of taxes levied against property owned solely by decedent. The court sustained an objection to the offers of proof, consisting of the checks and their use in payment of Mr. Zorn's obligations. Plaintiff was questioned as to whether he intended the initials "C," "C. W." and "C. W. Z." to be an identification of decedent. An objection by defendant was sustained and plaintiff then made an offer of proof that the initials were so intended, to which an objection was sustained. The several rulings are assigned as error.

[1, 2] If the ruling excluding the 12 sheets was upon the ground that they did not constitute a "book" and the further ground that the writing thereon did not constitute an "account," it was doubly sound. The notations had been made upon 12 separate sheets of paper over a period of years. At some later time, presumably in preparation for trial, the sheets had been stapled together. While plaintiff testified that they were sheets from his ledger and that they were his ledger account, it is clear that they had never been bound together in substantial or permanent form. They were not printed in the form of ledger sheets and would appear to have been taken from plaintiff's supply of billheads which he used for billing his customers. Notations of charges against many different persons for moneys advanced, made upon numerous separate sheets of paper, are not entries in a book of account and the sheets do not become an account book by being fastened together at the top by means of a staple. Account books are kept in every well regulated business which is conducted upon a credit basis and it is because of their presumed authenticity that they are admissible in evidence under an exception to the hearsay rule. The verity which attaches to entries made in a book of account, in the regular course of business, is derived from the permanent nature of the record. Notations made upon loose sheets of paper are not accorded the presumption of accuracy and reliability which they have when entered in book form, and are therefore inadmissible as books of account.

As stated in Foothill Ditch Co. v. Wallace Ranch Water Co., 25 Cal.App.2d 555 at page 566, 78 P.2d 215 at page 220, "It is rather well settled that a book account cannot consist of numerous loose pages not bound together in some substantial form. To constitute a book the pages must be fastened together with some degree of substantial permanency. [Citing cases.]"

[3] The court was also justified in ruling that the notations on the 12 sheets did not constitute an account of the transactions of plaintiff with the alleged borrowers or with the decedent. An account may consist of charges alone if there are no credits to enter (Bailey v. Hoffman, 99 Cal.App. 347, 278 P. 498), but plaintiff did not attempt nor offer to prove that any payments had or had not been made for credit upon the loans, or whether the alleged borrowers were entitled to credits or offsets.

[4] On the first page of the exhibit the items of alleged advances amounted to more than $5,300, and the charges for sums advanced other than those alleged to have been made to Zorn amounted to many thousands of dollars. The trial judge evidently did not believe that plaintiff's financing of his customers consisted solely of putting out money, without charging interest and without ever getting any of it back. Furthermore, there was no evidence to the effect that the sheets offered in evidence showed the balances due from the alleged borrowers, nor was there evidence that plaintiff did not have other memoranda which would show credits upon the alleged loans. Plaintiff testified that it was his practice to finance the farming operations of his customers. His testimony went no further than that, but the natural inference from it would be that he handled their crops either as a buyer or commission broker, in either of which events it would have been necessary for him to keep some sort of accounts of these transactions. There was no evidence as to the nature of the general business between plaintiff and Mr. Zorn, nor as to the state of their accounts in such transactions, nor as to whether plaintiff had other accounts and records which would show credits upon amounts which might have been loaned to him. The court would have been justified in regarding the writings as mere fragments of an account relating to only a part of the business dealings of plaintiff and decedent. Before an account is admissible in evidence for the purpose of establishing a cause of action on an open book account, it must be shown to have been accurately kept, which was not done in the instant case, and it must be so complete as to show the balance of indebtedness due from one party to the other, in which respect also plaintiff's evi-

dence was deficient. Creighton v. Creighton, 6 Cal.App.2d 270, 43 P.2d 1104; Tipps v. Landers, 182 Cal. 771, 774, 190 P. 173; Colburn v. Parrett, 27 Cal.App. 541, 150 P. 786; Brown v. Gow, 128 Cal.App. 671, 18 P.2d 377.

[5] It is plaintiff's contention that the writings were admissible in evidence under section 1953f of the Code of Civil Procedure, which reads as follows: "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." The section does not furnish an answer to the question whether the writings constituted a book account, nor does it furnish any ground for receiving in evidence as a book account a collection of sheets of paper such as we have described, which, if admitted, would not serve to prove the existence of a book account. It is unnecessary to decide whether the memoranda constituted a "record" kept by plaintiff in the regular course of his business which would have been admissible under the section if offered for some purpose other than to prove a book account. Plaintiff's cause of action was not for money loaned. If he failed to prove a book account he could not recover upon some other cause of action. Egan v. Bishop, 8 Cal.App.2d 119, 47 P.2d 500. The briefs present arguments as to whether plaintiff's evidence furnished a sufficient foundation for the introduction of a book account under section 1953f, in the absence of evidence that the account was fully and truly kept. Inasmuch as no account book was offered in evidence, it is unnecessary to express our views on this point. We are in agreement with the ruling that the memoranda did not constitute a book account and should not be received in evidence.

[6, 7] Our disposition of the first point requires approval of the rulings excluding from evidence plaintiff's cancelled checks and declining to receive the offered evidence as to the application of plaintiff's checks upon Zorn's debts to the banks, insurance company, and for taxes. It is argued that such proof would have furnished the basis for an inference that the initials used upon the several sheets were intended to identify decedent. We do not question the soundness of this argument, but such identification would not have supplied the defects in plaintiff's proof which we have pointed out. It may be, also, that if the book account had been proved, the additional evidence which was offered would have tended in some degree to verify the entries in the account by showing that they truly reflected financial transactions between plaintiff and decedent, but such evidence would not have tended in the slightest degree to prove that the sheets of paper which were offered in evidence constituted an account book or that the notations thereon constituted an account. If all of plaintiff's offered evidence had been received, it would have been insufficient in law to support a verdict in his favor. It would have been error for the court to deny the motion for a judgment of nonsuit.

The judgment is affirmed.

DESMOND, P. J., and WOOD, J., concur.

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FREEMAN et al. v. NICKERSON et al.

No. 13047.

District Court of Appeal, First District, Division 1, California.

Nov. 27, 1946.

1. Negligence ⚿32(1, 2), 52

Flooring contractor and his wife, who assisted him, were "business invitees" on premises of apartment building where they were installing a new floor, and proprietors owed duty to afford invitees reasonably safe premises and conditions upon which to carry out purpose of invitation and were required to advise invitees of dangers known to proprietors in instances where such dangers were not reasonably apparent to invitees.

See Words and Phrases, Permanent Edition, for all other definitions of "Business Invitee".

2. Appeal and error ⚿930(1)

Before an appellate tribunal is justified in reversing a judgment upon ground of insufficiency of evidence, it must appear from record that, accepting the full force of the evidence adduced, together with every inference favorable to prevailing party which may reasonably be drawn therefrom, law precludes prevailing party from recovering a judgment.

3. Appeal and error ⚿930(1)

On appeal on the ground of insufficiency of evidence, the evidence must be construed most strongly against the losing party, every favorable inference and presumption that may fairly be deduced from evidence should be resolved in favor of prevailing party, prevailing party's evidence must ordinarily be accepted as true and contradictory evidence must be disregarded.

4. Explosives ⚿7

Evidence sustained jury finding that apartment house proprietors were negligent in building a fire in incinerator in which they had instructed flooring contractor and his wife to dump oak dust accumulated in sanding floors, notwithstanding warning by contractor of explosive nature of dust when dumped on an open flame and assurance that no fire would be built.

5. Appeal and error ⚿1003

The weight of testimony contradictory to that indicating negligence on part of defendants may properly be argued to jury and to trial court on motion for a new trial but cannot be asserted on appeal.

6. Negligence ⚿136(9)

Contributory negligence is a question of law only when court is impelled to say that from facts reasonable men can draw but one inference, which points unerringly to the negligence of plaintiff contributing to his injury, and in all other cases question of contributory negligence is for jury.

7. Negligence ⚿56(3)

A violation of a statute or ordinance is not negligence per se unless act or omission proximately causes or contributes to injury.

8. Appeal and error ⚿996, 1001(1)

The finding of jury on issue of contributory negligence will not be disturbed on appeal if there is any substantial evidence or reasonable inference to support it.

9. Explosives ⚿7

Where there was evidence that defendants had assured plaintiffs, a flooring contractor and his wife who was helping him, that there would be no fire in incinerator so that oak dust, which was explosive when dumped on an open flame, could be dumped after sanding operations, but defendants permitted a fire to be built without telling plaintiffs, contributory negligence of plaintiff wife in removing hopper from opening of incinerator chute, in alleged violation of statute prohibiting removal of safety devices, in order to more easily dump dust was for jury. Labor Code, § 6406.

10. Negligence ⚿119(1)

Contributory negligence is an affirmative defense which must be pleaded and proven by defendant by a preponderance of the evidence unless evidence of plaintiff shows that injured party was guilty of contributory negligence.

11. Damages 🔑135

$375 medical expenses incurred by husband in treatment of wife's injuries, was not excessive.

12. Appeal and error 🔑1004(3)

The assessment of damages is first within province of jury and secondly within province of trial court when passing upon a motion for a new trial, and appellate court will not disturb verdict unless so grossly excessive as to immediately suggest that it was result of passion, prejudice or corruption on part of jury.

13. Appeal and error 🔑1004(1)

Jury's award of damages cannot be set aside on appeal where there is nothing to suggest that jury acted on passion, prejudice or corruption.

14. Damages 🔑132(1)

$12,125 for second and third degree burns about the face, hands and neck and one wrist of a 32 year old woman, who had previously been able to do a man's work, which burns prevented her from working and which permanently disfigured her face and hands, was not excessive.

15. Appeal and error 🔑1060(1)
Trial 🔑127

The gratuitous reference, either in evidence or argument, to fact that a defendant carries liability insurance is prejudicial misconduct justifying a reversal.

16. Trial 🔑127

Reference by witness to insurance is not improper if it is an integral part of competent testimony.

17. Appeal and error 🔑1060(1)
Trial 🔑127

Reference to insurance in plaintiff's testimony as to a conversation with defendant concerning accident to the effect that defendant told plaintiff "not to worry about it, that she was insured and would take care of it," was an integral part of an admission of liability and did not constitute prejudicial misconduct requiring a reversal.

18. Trial 🔑90, 127

Where testimony as to an admission of liability by defendant, which contained as an integral part an admission that defendant was insured, was properly admitted and no motion was made to strike out any part of such testimony, it was not improper for counsel to read it to jury and to comment upon it in his argument.

19. Negligence 🔑138(3)

Giving general instructions on the duties of an owner of premises to an invitee thereon was not error under the evidence.

20. Explosives 🔑7

The dangerous conditions of which an owner of premises must warn his invitee are not confined to mechanical dangers, so that where owner knew that invitee would be dumping oak dust into incinerator and that such dust was explosive if dumped upon an open flame, owner had duty to warn invitee of presence of fire in incinerator regardless of whether there was any mechanical defect in incinerator, the fire constituting a "dangerous condition" under the circumstances.

See Words and Phrases, Permanent Edition, for all other definitions of "Dangerous Condition".

21. Trial 🔑296(3)

Instruction on right of invitee to rely upon presumption that premises would be maintained in a reasonably safe and proper way was not reversible error for failure to include statement that invitee must have been exercising due care for her own safety, where jury was given that information in a number of other instructions.

22. Appeal and error 🔑1067
Trial 🔑206

Refusal to give instruction that evidence of oral admissions of a party, other than his or her own testimony in the trial, ought to be viewed by jury with caution was error, although not reversible in light of record. Code Civ.Proc. § 2061, subd. 4.

23. Trial 🔑267(1)

Trial court could properly modify requested instructions by eliminating therefrom long formula portions which omitted some elements that should have been included if they were to be given and which were unnecessary because proper parts thereof were fully covered by other instructions.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Wendolyn C. Freeman and Louie K. Freeman against Wm. E. Nickerson and Lucille Nickerson to recover for burns suffered by plaintiff Wendolyn C. Freeman as the result of an explosion. Verdict and judgment for plaintiffs, and defendants appeal.

Affirmed.

Charles V. Barfield, of San Francisco, Cal. (Franklin A. Plank, of San Francisco, Cal., of counsel), for appellants.

Nichols & Richard, of Oakland, Cal. (Stanley C. Smallwood, of Oakland, Cal., of counsel), for respondent.

SCHOTTKY, Justice pro tem.

Respondent-wife suffered burns upon her hands, face and neck as the result of an explosion that followed her deposit of highly combustible and explosive sawdust, accumulated during a sanding operation performed after a hardwood floor was installed, into a garbage incinerator chute situated on the first floor of appellants' appartment house. Respondents commenced an action against appellants to recover for the personal injuries sustained by the wife while engaged in performing contract services in appellants' apartment house and for medical expenses incurred by respondent-husband. The jury rendered a verdict in favor of respondents for $12,500. Appellants' motion for a new trial was denied. This appeal is from the judgment entered upon the verdict.

Appellants urge the following as grounds for the reversal of the judgment: (1) Insufficiency of the evidence on appellants' negligence; (2) That respondents were guilty of contributory negligence as matter of law; (3) Prejudicial misconduct of respondent-husband and his counsel in bringing to the jury's attention the fact that defendants were insured; (4) Grossly excessive damages; (5) Error in giving and refusing instructions.

Before proceeding to discuss these contentions of appellants, we shall give a brief summary of the evidence.

Appellants, husband and wife, owned a three story, 27 unit apartment house at 624 Brooklyn Avenue, Oakland—all apartments therein being occupied on the date of the incident herein involved (August 21, 1944). Respondent-husband was an independent contractor engaged in the business of installing hardwood floors, and he was engaged by defendant-wife to install some hardwood flooring in one of the apartments. (There is no dispute concerning the authority of the wife to make such contract—she being the active manager of the premises while her husband had outside employment.)

Respondent-wife was in the habit of working with her husband on his jobs, and she was assisting him in doing the work required under his agreement with appellants. The job was commenced on Tuesday, August 15, 1944, six days before the date of the injury to respondent-wife. Neither of the respondents worked there on that first day (Tuesday), but they had another contractor, S. M. Pierce, doing the original floor laying on that day. The wife, however, worked on Wednesday (August 16)—helping to "lay the floors" and "set nails."

As part of the floor-laying process, respondents used a mechanical device known as a "sander" or "sanding machine." This device resembles, in appearance and operation, a vacuum cleaner—with sawdust of a fine, "floury" consistency being sucked up into a bag attachment.

There is expert testimony (of respondents' witness, John Finn) that although this "oak dust" or sawdust is not spontaneously combustible until it is subject to heat of 600 degrees, if it is poured upon an open flame it will ignite and explode, and the "flame will follow up the path you are dropping the dust down."

It is uncontradicted that both respondent-wife and respondent-husband were fully aware of the dangerously explosive and incendiary nature of the product of their "sanding" operations, if poured on an open flame.

Appellants' apartment house was equipped with a brick garbage incinerator (apparently on the basement floor) which was about three feet square and about five feet high. The garbage chute or chimney thereto ran up through the three floors of the building, with an opening on each floor set off from the common hallways and situated in a closet (on each floor) about four feet square and nine feet high. The chute opening on each floor was fitted with a scoop or hopper which fitted into the chute opening, and into which the garbage was deposited. When that hopper was placed in its closed position, the garbage would then drop from the base of the receptacle down into the incinerator. The incinerator and chute were in good condition at the time of the accident. Appellants' expert, H. E. R. Dannett, testified that the bottom or "shield" of the hopper—which closed the chute opening and kept the garbage deposited from passing down into the incinerator until the hopper was put into its "closed" position—was a "safety measure to prevent any smoke or flame coming through * * * that opening when the door is open."

Respondent-wife was aware that the "chute" into which she deposited the "oak dust" was an "incinerator chute" rather than a "wet garbage" chute. She also knew that tenants would be dropping garbage down the chute "all of the time," but did not think the tenants would be dropping "lighted cigarettes" into the chute.

Respondent-wife testified that the sanding machine was "set up" on Wednesday afternoon (August 16) just before the conclusion of their day's work, but that the real sanding operations were not started until Thursday. Mr. Pierce operated the sander. The oak dust which accumulated that morning was emptied by Pierce from the bag into two or three pasteboard boxes. "Around noon" on that day respondent-wife heard appellant-wife ask Mr. Freeman "what he was going to do with the dust." He told her to have the garbage man carry it away; to which Mrs. Nickerson replied that "she didn't much like to do that" and asked if she "couldn't empty it into the incinerator down the hall." According to Mrs. Freeman, her husband said, "Well, you can't put it there if there is a fire in the incinerator because it is dangerously explosive if emptied on an open fire"; after which appellant-wife said, "Well, it will be perfectly all right to empty it there because there is no fire in the incinerator except on Friday." Respondent-wife also testified that appellant then showed Mr. Freeman where the incinerator chute was located on the first floor (where the work was being done), and right after that both respondents carried the three boxes containing the oak dust to the chute and the husband dumped the dust into the incinerator.

Respondent-husband testified to that identical conversation had between himself and appellant, and fixed Pierce and respondent—wife as being present at the conversation. He was very positive in his testimony that he told Mrs. Nickerson of the danger of throwing the dust on an open flame, and in her reply thereto that a fire was "built" in the incinerator "only on Fridays." Pierce, respondent-husband's associate, also testified that he heard the identical statements testified to as above noted by both respondents. He also knew that the oak dust would explode if scattered over an open flame. He testified that Freeman dumped "two or three boxes" into the chute on "Thursday morning." and he himself dumped some out of the "bag" in the afternoon and nothing happened.

Appellant-wife denied that the conversation above discussed took place between herself and Mr. Freeman. She said that Mr. Freeman met her in the hallway and asked her "Where is the incinerator so I can dispose of my refuse," and that she replied, "Here is the incinerator, but be careful, don't clog it up, we don't want any smoke." She testified that that conversation took place during the "forenoon" on Thursday. She also testified that she was not aware of the inflammable and explosive nature of the oak dust, that Mr. Freeman did not so advise her of such, and that she did not say that a fire was built in the incinerator only on Fridays. Her testimony is that it was their "practice to light it every morning." Mrs. Nickerson was corroborated on the daily lighting of the fire by her husband, tenants Mr. Weir and Mrs. Prendergast, janitor William

Felt and his son Douglas Felt, who assisted his father and substituted for him in periods of his absence. Douglas Felt also testified that he lit the incinerator fire at "about 8:00 o'clock" on the "day that that explosion happened." He said he then left the building and did not return until after the accident. His father was in Ogden, Utah, on the day of the explosion.

There is testimony that an accumulation of refuse in the incinerator for a week (i. e., Friday to Friday) would bring it up to the first floor hopper or the second floor level.

Respondent-wife also testified that no dust was dumped on Friday (August 18), and that they did not work on Saturday or Sunday. They returned to work on Monday, and her husband dumped some oak dust on Monday morning "about 9:30 or 10:00" o'clock. She emptied a bag of dust "about one-third full" "around 2:00 o'clock" Monday afternoon, and "had no difficulty when she poured the dust into the incinerator chute. She saw no flame in the incinerator and the hopper handle did not feel warm. Nobody told her that there was or would be a fire in the incinerator on Monday, August 21. She went back later on that afternoon to dump a "double handful" out of the bag, and at that time the explosion occurred, which resulted in the burning of her face, neck and hands. She said that in doing the dumping, she removed the "top" of the incinerator. A comparison of that statement with her prior testimony would seem to disclose that by "top" she meant the "hopper" or "scoop" which was inserted into the chute opening, and into which the garbage deposits were made. She placed the bag "slightly" into the incinerator so she would not "track" the dust over the closet—this, as she testified, for the reason that appellant-wife had instructed Mr. Freeman "about the dust getting—tracking all over everything."

Respondent-wife further testified that she was (after the explosion) carried into Mrs. Nickerson's room and placed on a bed. She heard appellant-wife tell Mr. Freeman "how sorry she was, she had had the janitor build a fire and she had forgotten to tell him" and that "she kind of felt like it was her fault." Respondent-husband testified that immediately after the explosion Mrs. Nickerson "volunteered and told me that she was sorry" and that she "just had the janitor build a fire," and that she had "meant to tell" him "about it and overlooked it or forgot it."

Mrs. Nickerson denied ever having made such statement. Two other tenants, Mrs. Kinst and Mrs. Prendergast, testified that they were in the same room with both respondents and Mrs. Nickerson, and that they did not hear any such statement made by appellant-wife.

Respondent husband testified that the day after the accident he asked Mrs. Nickerson if he could have the money remaining due under the contract, as he "had some extra debts on hand," and that she told him "not to worry about that, that she was insured, and she would take care of that," and she paid him the balance of the contract price before he finished the job. Mrs. Nickerson testified that on Tuesday morning (after the accident) Mr. Freeman told her that he did not feel that the injury to his wife was attributable to any fault on the part of appellant-wife.

Appellants' first contention is that there is no substantial evidence to establish any actionable negligence on the part of defendants.

[1] Both respondents were, of course, business visitors or invitees on the premises of appellants, and, as the owners of the property, appellants owed respondents the duty to afford them reasonably safe premises and conditions upon which to carry out the purpose of the "invitation." Dobbie v. Pacific Gas & Electric Co., 95 Cal.App. 781, 273 P. 630; Sawyer v. Hooper, 79 Cal.App. 395, 249 P. 530; Hinds v. Wheadon, 19 Cal.2d 458, 121 P.2d 724. In the fulfillment of such responsibility, it is the duty of the owner to advise the invitee of hidden dangers known to such owner, in instances where such dangers are not reasonably apparent to the invitee. Riley v. Berkeley Motors, Inc., 1 Cal.App.2d 217, 36 P.2d 398; Lejeune v. General Petroleum Corporation, 128 Cal. App. 404, 18 P.2d 429.

[2, 3] It is a rule too well established to require the citation of authorities that before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may reasonably be drawn therefrom, it still appears that the law precludes the prevailing party from recovering a judgment. The evidence must be construed most strongly against the losing party. Every favorable inference and presumption that may fairly be deduced from the evidence should be resolved in favor of the prevailing party. The prevailing party's evidence must ordinarily be accepted as true, and contradictory evidence must be disregarded.

[4, 5] This familiar rule is too often disregarded by counsel who insist upon arguing conflicting evidence before an appellate tribunal. In the instant case there is evidence, as shown by the summary hereinbefore set forth, that appellants wished to have respondents empty the dust "into the incinerator down the hall" and were told by respondent-husband that it could not be put there if there was a fire in the incinerator because it was dangerously explosive, after which appellant-wife told respondent that it would be "perfectly all right to empty it there because there is no fire in the incinerator except on Friday." The accident occurred on Monday afternoon, and there is in the record the statement of appellant-wife, made after the accident, to the effect that she had had the janitor build a fire that morning and had forgotten to tell respondents. It appears, therefore, that there was evidence showing that appellants knew that the oak dust was explosive when exposed to fire, and that they assured respondents that there would be no fire in the incinerator on any day except Friday, and that they caused a fire to be started in the incinerator on Monday and did not inform respondents that they had done so. It is true that there was evidence contradicting the foregoing statements, and it was quite proper for appellants to argue the weight of this before the jury and before the trial court on their motion for a new trial, but in view of the record in the instant case and the rule as to the function of an appellate tribunal, appellants' contention that there is no substantial evidence to establish negligence on the part of appellants is entirely without merit.

Appellants' second contention is that respondents were guilty of contributory negligence as a matter of law. They argue, first, that it was contributory negligence per se for Mrs. Freeman to have removed the "hopper" or "scoop" before dumping the contents of the "sander" bag into the chute, and second, that the removal of the hopper violated section 6406 of the Labor Code (prohibiting the removal, displacement, etc., of safety devices furnished for use in any employment or place of employment), and that this was negligence per se which proximately contributed to respondent-wife's injuries.

[6, 7] As was said by our Supreme Court in Flores v. Fitzgerald, 204 Cal. 374, at page 376, 268 P. 369, at page 370:

"'Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury.' Reaugh v. Cudahy Packing Co., 189 Cal. 335, 336, 208 P. 125, 128; Smith v. Southern Pacific Co. [201 Cal. 57], 255 P. 500. In all other cases the question of contributory negligence is a question of fact for the jury. Wahlgren v. Market St. Ry. Co., 132 Cal. 656, 663, 62 P. 308, 64 P. 993; Jansson v. National Steamship Co., 189 Cal. [187], 192, 208 P. 90; Smith v. Southern Pacific Co., supra." And again 204 Cal. at page 378, 268 P. at page 371: "Although the violation of the ordinance may have been negligence per se, yet, as it was not shown that such negligence was the direct or proximate cause of his injury, it will not defeat his right of recovery for damages sustained by reason of said injury. Lawrence v. Southern Pacific Co., 189 Cal. 434, 442, 208 P. 966."

In Burtt v. Bank of California Nat. Ass'n, 211 Cal. 548, at page 551, 296 P. 68, at page 69, the court said: "The principle that a violation of a statute or ordinance is negligence per se is subject to the limitation that the act or omission must proximately cause or contribute to the injury in order to bar a recovery. Skaggs v. Wiley, [108] Cal.App. [429], 292 P. 132; Dewhirst v. Leopold, 194 Cal. 424, 431, 229 P. 30; Williams v. Southern Pac. Co., 173 Cal. 525, 539, 540, 160 P. 660; 19 Cal.Jur. 636, § 67."

In Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, at page 513, 50 P.2d 801, at page 803, the court said: "The evidence shows that the lack of the handrail was neither the proximate nor any cause of plaintiff's fall. Any violation of the ordinance by the defendant would therefore be immaterial."

[8] It is a familiar rule, so often announced by our appellee tribunals as to have become axiomatic, that contributory negligence is a question of fact for the jury to determine and that the finding of the jury upon that issue will not be disturbed upon appeal if there is any substantial evidence or reasonable inference to support it.

[9] Appellants argue that since it is undenied that Mrs. Freeman had full knowledge of the inflammable and explosive qualities of the dust, she should have merely dumped the dust into the scoop-like hopper (which they, of course, contend was a safety device to prevent escape of flame and smoke from the chute opening) and then caused the dust to cascade down by closing the hopper—thus "sealing up" the chute opening. Since she knew it was an "incinerator," and not merely a "wet garbage" chute, they argue that her actions were negligent as a matter of law. This assumes, of course, that in addition to knowing she was dumping the dust into an incinerator, Mrs. Freeman had reason to know as a prudent person in the exercise of due care, that there was then a likelihood of the existence of a fire therein. However, there is evidence in the record—which the jury was certainly entitled to believe—that respondent had appellant-wife's assurance that no fire need be anticipated except on Friday, and, as a necessary implication of such assurance, that the dust could, with safety, be deposited in the incinerator on other days.

In support of their contention that respondent-wife was guilty of contributory negligence as a matter of law, appellants cite Hurtel v. Albert Cohn, 5 Cal.2d 145, at page 147, 52 P.2d 922, at page 923, in which it is said: "* * * it is well-settled rule in this state that the violation of a statute or ordinance constitutes negligence per se (19 Cal.Jur. 632, and cases there cited), and that it constitutes contributory negligence *if the failure to comply with the ordinance contributes directly to the injury.*" (Emphasis added.)

Under the rule set out in the Hurtel case, then, it must be found that the violation of the statute—as in all other cases testing the application of the doctrine of contributory negligence—contributed "directly" or "proximately" to the injury suffered by respondent. In the instant case, the jury had before it evidence which would reasonably justify a conclusion that there was no proximate causation between the removal of the "safeguarding" hopper and the injury to respondent. Can it not be said that the real or proximate cause of the explosion was the presence of a fire in the incinerator (which, it would seem, the jury was privileged to infer) at a time when plaintiff had adequate reason for believing that no such fire existed? The jury might well have concluded that there was no danger at all associated with dumping the dust into the incinerator when no fire was present therein—for the evidence seems to indicate that the dust would not explode or go aflame unless thrown on an open fire or contacted by heat, other than an open flame, of 600 degrees or more. In a sense, then, and since there is evidence of the "no fire except on Friday" assurance, respondent was not "removing" any "safety device or safeguard" in contravention of the statute—for she had justification for believing that on the then condition of the incinerator (no fire burning) there was no reason to fear that any flames or explosion would follow her deposit of the oak dust into the chute. This is certainly not the same as a case where, for instance, one operating a piece of industrial machinery might remove a safeguard or safety device intended to protect against dangers incidental to such operation, and then, in virtue of such removal, sustain the identical injury which the safeguard was meant to protect against.

[10] In Flach v. Fikes, 204 Cal. 329, at page 332, 267 P. 1079, at page 1080, the court said: "Contributory negligence is an affirmative defense, and it must be pleaded and proven by the defendant. Unless the evidence on the part of the plaintiff shows that the injured party was guilty of contributory negligence, the defendant must show by a preponderance of the evidence that said injured party was guilty of such negligence. * * * This question is one for the determination of the jury or the trial court, and their finding thereon is binding upon an appellate court. Scott v. San Bernardino Valley etc. Co., 152 Cal. 604, 93 P. 677; Clark v. Bennett, 123 Cal. 275, 277, 55 P. 908; Schneider v. Market Street Ry Co., 134 Cal. 482, 488, 66 P. 734."

We conclude, therefore, that appellants' contention that respondents were guilty of contributory negligence as a matter of law cannot be sustained.

[11] We shall now discuss appellants' contention that the award of $12,500 was grossly excessive. It is not urged that the amount of $375 for the medical expenses incurred by respondent-husband in the treatment of the wife's injuries was excessive, but only that the remaining $12,125 for the injuries sustained by respondent-wife was grossly excessive. No authorities are cited by appellants upon this point.

[12, 13] In the recent case of Estrada v. Orwitz, 75 Cal.App.2d 54, at page 60, 170 P.2d 43, at page 47, in which an award of $4000 damages for improper extraction of five teeth was affirmed, this court said: "We cannot hold, as a matter of law, that the judgment is excessive. The judgment is within the realm of reason. The rule applicable to such a situation was aptly stated in Stanhope v. Los Angeles College of Chiropractic, 54 Cal.App.2d 141, at page 148, 128 P.2d 705, at page 708, as follows: 'The assessment of damages is first of all the province of the jury, and secondly, that of the trial court when passing upon a motion for a new trial, therefore, an appellate court will not disturb the verdict unless it is so grossly excessive as to immediately suggest that it was the result of passion, prejudice or corruption on the part of the jury. [Citing two cases.] Moreover, the jury's award of damages cannot be set aside on appeal where there is nothing to suggest that the jury acted through passion, prejudice or corruption.' See, also, Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 785, 117 P.2d 850; Koyer v. McComber, 12 Cal.2d 175, 182, 82 P.2d 941; Johnson v. McRee, 66 Cal.App.2d 524, 529, 152 P.2d 526. We cannot say, as a matter of law, that the jury acted through passion, prejudice or corruption. It must be remembered that the purchasing power of the dollar is much less than it was a few years ago, so that a verdict that might have been considered very high or even excessive then, would, today, be within the realm of reason. That this is a proper factor to consider on this question was recently held in Butler v. Allen, 73 Cal.App.2d 866, 167 P.2d 488, 490 (hearing denied in Supreme Court) * * *."

[14] The record shows that at the time of injury respondent-wife was 32 years old and was able to do a man's work while working with her husband in his business of laying and sanding of hardwood floors. Her face, neck, hands and one of her wrists was burned. The burns on her face were second degree burns and one of her wrists was scarred as the result of a third degree burn. She suffered severe pain after the injury and had to remain in bed for two weeks. At the time of the trial, some eight months after the injury, the only work she was able to do was some sweeping for her husband, but she had difficulty in holding the broom because she had lost the strength in her hand. She still suffered pain in her hands, stating, "they draw and itch, the skin does, all of the time". She had deformed and unnatural skin on her hands. There was a scar on her wrists, one of her knuckles was mashed down, and she was unable to close her hand. There was a scar on her neck and she still felt an itching, drawing and pulling in her face, stating: "I have to * * * make all kinds of faces to keep my mouth open; you see it is quite a good deal smaller than it was, my upper lip is very near gone."

In view of the injuries above set forth, and bearing in mind that the jury had the opportunity of observing respondent-wife, it does not appear to us that the amount awarded by the jury was, in the language of the Supreme Court in Bellman v. San Francisco High School Dist., 11 Cal.2d 576, at page 586, 81 P.2d 894, at page 899, "So excessive, when compared with a sum reasonably warranted by the evidence showing the nature and extent of the injuries received, as to shock the sense of justice and raise the presumption that the amount was arrived at as the result of passion and prejudice rather than upon a fair and honest consideration of the facts." We are rather inclined to the view that the jury felt that the facial disfigurement and other injuries received by this young woman justified a substantial award and reflected that amount in their verdict. Furthermore, the learned trial judge, who had the opportunity of hearing the evidence and observing the respondent-wife, and whose powers in ruling upon a motion for a new trial are much broader than is the power of this court upon appeal, must not have considered the award excessive as he denied appellants' motion for a new trial.

Appellants next contend that the respondent-husband "and his counsel were guilty of highly prejudicial misconduct in the former's gratuitous testimony that the defendants were insured, and in the latter's emphasis of such testimony in his argument to the jury."

The testimony of respondent-husband referred to is as follows:

"Q. You just tell us what she said. A. She [appellant-wife] asked how my wife was getting along and I told her, etc. * * * I asked her would she mind paying me the remainder of the bill, as I had some extra debts on hand, and she told me not to worry about that, that she was insured and she would take care of that.

"Q. What was that? A. Mrs. Nickerson said, 'I will take care of that,' and she paid me the balance of the bill before I finished the job.

"Q. Did she say anything else? A. She told me to contact her in two or three days and I finished the job I think on Wednesday, and she said that she hadn't heard any more, and I saw her on Friday and she said that she had been instructed not to say anything, and said that she was sorry, and that was the last I ever talked to her."

Appellants assert: "The conversation to which the plaintiff Louie K. Freeman testified was in nowise connected with any admission of the defendant, and the alleged statement of defendant that she was insured was unwarrantedly and gratuitously injected by the plaintiff into this story of the conversation with reference to the payment by defendant of the bill for his work on the floors. This subject had no connection with the accident, was not introduced by the defendants, and certainly it cannot be held that the mention by plaintiff of the fact that defendant was insured was incidental to any relevant or material evidence in the case. On the other hand, it is quite evident that it was deliberately injected into his testimony by the plaintiff Louie K. Freeman."

[15] It is well settled in California that gratuitous references, either in the evidence or the argument, to the fact that a defendant carries liability insurance is prejudicial misconduct justifying a reversal. Squires v. Riffe, 211 Cal. 370, 295 P. 517; Rising v. Veatch, 117 Cal.App. 404, 3 P.2d 1023; Citti v. Bava, 204 Cal. 136, 266 P. 954; Sischo v. City of Los Banos, 26 Cal.App.2d 642, 80 P.2d 116, 1020; Nichols v. Smith, 136 Cal.App. 272, 28 P.2d 693; Schellenberg v. Southern California Musical Co., 139 Cal.App. 777, 35 P.2d 156; 10 Cal.Jur.Supp. 664.

The language of the Supreme Court in Citti v. Bava, supra, 204 Cal. at page 138, 266 P. 954, 955, is typical of the above cited cases. Referring to proof of a settlement disclosing "the fact that the defendant was indemnified by a policy of insurance," it is there said: "The evidence of the settlement, alone, not connected up with any act or admission of the defendant, and concerning which he had nothing to do, was clearly inadmissible in evidence. The error in admitting it might not in and of itself require a reversal, but, coupled with the avowed purpose and successful attempt of plaintiff's counsel to get before the jury, not only the fact of the settlement, but also that the settlement was made by the insurance carrier of the defendant, puts the case in a position where section 4½ of article 6 of the Constitution will not save the judgment. The natural tendency of a line of examination that suggests to the jury that the defendant is indemnified against any judgment for damages against him is highly prejudicial to his rights, especially in a closely balanced case where the evidence otherwise would be easily sufficient on appeal to support a verdict either for the plaintiff or for the defendant. Such attempts on the part of counsel have frequently been held to be improper and prejudicial. * * * From an examination of the record in this case it is impossible for us to state that the jury would not have found a different verdict had the objectionable examination not taken place and the evidence not been admitted."

In Sischo v. City of Los Banos, supra, the plaintiff testified to a conversation with the mayor of defendant city in a hospital shortly after the accident (26 Cal.App.2d at page 646, 80 P.2d at page 119): "'A. Well, the start of that conversation of course was about myself, how I was getting along, and how I felt, and how I was resting, and that he expressed his sympathy, the fact that I was so seriously injured, but the conversation led to the point where he said that the City of Los Banos in this matter was very lucky, due to his forethought in the matter; he said: "We have taken out insurance, we only took out insurance only ten days before you had fallen."'" The appellate court said 26 Cal.App.2d at page 647, 80 P.2d at page 119: "That the admission of this testimony was prejudicially erroneous is shown by the case of Squires v. Riffe, 211 Cal. 370, 295 P. 517. The opinion of Toscano had no relevancy whatever to the issues involved. * * * The statement as to the insurance was not involved in anything connected with the accident. * * * As stated in the case of Squires v. Riffe, supra, it must be presumed that counsel for the plaintiff knew the answer which his client would give, and that it would serve no purpose except to show that the city carried insurance."

Respondents contend that the foregoing decisions cited by appellants are not applicable to the instant case for the reason that the production of evidence of insurance is not misconduct where that evidence is an integral and inseparable part of other evidence that is material, as, for example, an admission.

One of the decisions relied upon by respondents is the case of Walter v. England, 133 Cal.App. 676, 24 P.2d 930, 932 (hearing denied), in which the patient of a dentist, who subsequently was sued in a malpractice action went to the dentist and suggested that, inasmuch as all that plaintiff wanted was reimbursement for expenses, the dentist go to the insurance company, tell them he had made a mistake, and get the insurance company to make the desired reimbursement. Evidence that the defendant thanked the plaintiff and then stated: "I'll go down to my insurance company when I am in San Francisco and tell them I have made a mistake * * *" was held to be proper evidence. The court said 133 Cal.App. at page 688, 689, 24 P.2d at page 935: "It is a general rule that in this class of cases reference to the fact that a defendant is indemnified by a policy of insurance is prejudicial error, and the evil effect upon the jury of such a reference cannot be cured by striking out the testimony, nor by an admonition to the jury not to consider it in any way. Rising v. Veatch, supra; Squires v. Riffe, 211 Cal. 370, 295 P. 517; Citti v. Bava, 204 Cal. 136, 266 P. 954. This rule, however, does not prevent such evidence being proper where the conversation involves an admission of responsibility. King v. Wilson, 116 Cal.App. 191, 2 P.2d 833; Harju v. Market St. Ry. Co., 114 Cal.App. 138, 299 P. 788; McPhee v. Lavin, 183 Cal. 264, 191 P. 23; Lahti v. McMenamin, 204 Cal. 415, 268 P. 644. In the case before us, the conversation amounted to an admission that the appellant had made a mistake. We have heretofore held that this admission, when considered with all the testimony in the case is, subject to interpretation as an admission of negligence, and the jury were the judges of its effect.

"The evidence having been properly admitted, we find no prejudicial error in referring to it in the argument to the jury."

And in McPhee v. Lavin, 183 Cal. 264, at page 269, 191 P. 23, at page 25, the court said: "The errors of law assigned upon admission of testimony over defendant's objections and motions to strike, so far as in any way suggestive of prejudice, arise upon the admission in evidence, as part of a conversation had with defendant, of defendant's declaration to plaintiff, immediately after the collision that he carried accident insurance that would provide for plaintiff if he had suffered injury. As this was admitted as tending to show an acknowledgment of responsibility by defendant for the accident, we think it was proper evidence."

In Dullanty v. Smith, 203 Cal. 621, at page 625, 265 P. 814, at page 816 the court said: "The fact that this testimony contained, in addition to unobjectionable matter, references to the insurance of defendant did not necessarily make it inadmissible for all purposes. It is true that the court frowns upon any attempt to show that a defendant carries indemnity insurance, but where, as here, there is an entire absence of any indication whatsoever of lack of good faith on the part of plaintiff, evidence of this character, as an admission against interest, or for certain other purposes, may be received, notwithstanding the fact that it contains material which under other circumstances would be objectionable. Upham Co. v. United States etc. Co., 59 Cal. App. 606, 610, 211 P. 809. See, also, McPhee v. Lavin, 183 Cal. 264, 269, 191 P. 23, treating of the very situation here under consideration."

And in North v. Vinton, 17 Cal.App.2d 214, at page 219, 61 P.2d 950, at page 952, this court said: "With respect to the two witnesses whose testimony is made the subject of defendant's second complaint, it may be stated generally that while a reference to the fact that defendant is insured against liability may be highly prejudicial, and courts do not hesitate to set aside verdicts of juries where such evidence is improperly admitted, it is a well-settled exception to the general rule that where a defendant makes a statement which may be fairly construed as an admission or acknowledgement of responsibility and as a part of the same statement makes incidental reference to the fact that he carries insurance, the entire statement is admissible, not to prove the fact of insurance, but solely because the reference to the insurance is part of the admission. Handley v. Lombardi, 122 Cal.App. 22, 9 P.2d 867, and cases cited; Harju v. Market Street Ry. Co., 114 Cal.App. 138, 299 P. 788; Noble v. Bacon, 129 Cal.App. 177, 18 P.2d 699. In other words, under the circumstances above stated the entire statement is admissible, even though it does reveal that the defendant carries indemnity insurance. King v. Wilson, 116 Cal.App. 191, 2 P.2d 833."

[16, 17] The foregoing cases would seem to support the proposition that reference to insurance is not improper if it is an integral part of competent testimony. In the instant case it would appear that the reference to insurance was an integral part of an admission of liability. The jury was certainly entitled to infer from appellant-wife's statement to respondent-husband, telling him "not to worry about it, that she was insured and would take care of it," that she felt that appellants were responsible for the situation and that the statement with respect to insurance was to be construed as an admission of liability. Even in Squires v. Riffe, supra, cited by appellants in support of their argument of misconduct, the court cited with approval the following from Citti v. Bava, 204 Cal. 136, 266 P. 954: "The evidence of the settlement, alone, *not connected up with any act or admission of the defendant* * * * was clearly inadmissible in evidence." (211 Cal. at page 374, 295 P. at p. 519. emphasis added.)

If the mention of defendants' insurance coverage is brought into the case gratuitously and is unrelated to a genuine issue in the case, it would, under the authorities, be misconduct justifying a reversal, but if the reference to insurance is connected up with an admission of negligence or of liability, or any other relevant admission, it will not be deemed misconduct, even though the law frowns upon references to defendants' insurance coverage. In view of the fact that the mention of insurance by respondent-husband upon the witness stand was related to and in connection with what may well be construed as an admission of liability on the part of appellants, we cannot hold that it was improper or that it constituted misconduct in the instant case.

Appellants contend further that counsel for respondents deliberately emphasized the asserted prejudicial testimony in his closing argument to the jury. In the course of his argument respondent's counsel stated: "Ladies and gentlemen you have heard the testimony of my client Mr. Freeman. It is all right here in this transcript. I will show it to you and you check me up and see that I read it correctly." Counsel then read to the jury the testimony hereinbefore set forth and continued as follows: "Now, ladies and gentlemen, that was Mrs. Nickerson's attitude when she was free to talk with the plaintiff, but after someone had instructed her not to talk any more, the door was closed forever and all my clients could do was to wait for someone to come and see them and do what was right by them, but they never came and that is why we are here."

Appellants urge that "counsel's reading, and pointing out in the transcript, of the testimony that the defendant said that she was insured and that she had been instructed not to say anything, admit of no other conclusion than that the fact that the defendants were insured was strongly and emphatically brought to the jury's attention."

[18] The argument of counsel does not appear in the reporter's transcript, but the criticised portions thereof are set out in an affidavit by appellants' counsel in support of appellants' motion for a new trial and counsel for respondents in his counter-affidavit does not deny that he made such statements in his argument. We have serious doubts as to whether the asserted portions of the argument of respondents' counsel are properly a part of the record on this appeal, but, assuming that the matter is properly before this court, we believe that the evidence in question, having been properly admitted, and no motion having been made to strike out any part of it, it was not improper for counsel to read it to the jury and to comment upon it in his argument, for, as stated in Walter v. England, supra, "The evidence having been properly admitted, we find no prejudicial error in respondent's counsel referring to it in his argument to the jury."

Counsel for respondents in his counter-affidavit upon appellants' motion for a new trial states that he "did not seek to convey to the jury that the defendants were insured nor did he convey to the jury that the defendants were insured; that this affiant never alluded to insurance in his argument at any time other than to read the record of the testimony as the same was reported by the court reporter." We are unwilling to assume that counsel for respondents acted in bad faith and we do not believe that the comment or argument of counsel added anything to the statement of appellant-wife in telling respondent husband "not to worry about that, that she was insured, and she would take care of that." Evidently the learned trial judge was of the same opinion, for after having heard the evidence of the witness and the argument of counsel, claimed to be prejudicial, he denied appellants' motion for a new trial.

Before leaving this phase of the case we think it proper to add that appellants made no objection to the said testimony, and made no motion to strike it out, nor did they make any assignment of misconduct or motion for a mistrial. Neither did they offer any instruction that no insurance company was a party to the action, nor did they make any objection or assignment of misconduct at the time the statements were made in the argument. Such motions, objections and assignments were made in practically all of the cases relied upon by appellants in support of their claim of prejudicial misconduct, and the fact that appellants' counsel did not make them in the instant case indicates that counsel did not at the time regard them as improper or prejudicial.

Appellants' final contention is that the trial court erred in the giving of seven instructions, in refusing to give one instruction, and in modifying two instructions proposed by appellants.

[19] Appellants make essentially the same criticism of four instructions, arguing that they were improper because they did not distinguish between a property owner's knowledge of a "condition" on his premises and his knowledge or duty to know of a "danger" connected with that "condition." A reading of the instructions shows that they are standard instructions respecting the duty owed by an owner of premises to an invitee. Appellants do not argue that the instructions incorrectly set out the general law governing the owner-invitee relationship, but only that, because of the peculiar facts of this case, the instructions were not a fair coverage of their duty. It is their position that while they could know of the existence of the "condition"—i. e., fire in the incinerator—they may not have known of the "dangers" connected with depositing the oak dust down upon that fire. Appellants' reasoning seems faulty for the reason that there is evidence in the record that appellant-wife was made fully aware of the dangers which were inherent in having a fire in the incinerator at a time when the dust was deposited. With such evidence in the record, the trial court would be justified in giving the general instructions on owner-invitee duties—for, being aware of the danger, it was Mrs. Nickerson's duty to inform her invitees that the incinerator had been lighted.

The next two criticized instructions are as follows: "The owner is not bound to discover defects which reasonable inspection would not disclose, and he is entitled to assume that the invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. In brief, there is no duty to give the invitee notice of an obvious danger. In the absence of appearances that caution him, or would caution a reasonably prudent person in like position, to the contrary, the invitee has a right to assume that the premises he was invited to enter are reasonably safe for the purposes for which the invitation was extended, and to act on that assumption." "It follows, therefore, as a matter of law, that the status of the plaintiffs was, in law, that of an invitee, and that it was the duty of the defendants to the plaintiffs to keep and maintain the premises in a reasonably safe condition. The degree of care required to be taken in such a situation is that of reasonable care."

[20] Appellants' attack on these two instructions is apparently based upon the lack of evidence that the incinerator and chute were mechanically defective. There is no evidence in the record that there was anything mechanically wrong with the chute or the incinerator—but the foregoing instructions do not require, for their justification, that the garbage unit be mechanically defective. The dangerous "conditions" of which an owner of premises must warn his invitee are not confined to mechanical dangers. Maintaining safe premises in the present case included the duty of warning plaintiffs of the presence of fire in the incinerator—for, while dumping the dust down into the incinerator was a harmless activity so long as no fire was burning, it became fraught with peril the moment a fire was started. In that sense, then, a dangerous condition was created, and lack of defects in the mechanical agency used was immaterial.

[21] The final instruction in this group is as follows: "The plaintiff was entitled to reply upon the presumption that the premises would be maintained in a reasonably safe and proper way, and she was entitled to rely upon this presumption unless and until it would be apparent to a reasonably prudent person similarly situated as was the plaintiff that said premises were not maintained in a reasonably safe way."

Appellants challenge this instruction by saying that it does not state that in order to rely upon such presumption of due care by defendant, plaintiff herself must have been exercising due care for her own safety. Citing Angelo v. Ksau, 34 Cal.App.2d 130, 93 P.2d 205. While such is undoubtedly the law, in Fowler v. Allen, 49 Cal.App.2d 214, 121 P.2d 41, the court said that although it is preferable in such instruction to instruct that a plaintiff taking advantage of that assumption of due care by defendant must himself be exercising due care for his own safety, a failure to so condition the instruction does not constitute reversible error. 149 Cal.App.2d at page 219, 121 P.2d 41. Furthermore, the instruction must be considered as a whole and the jury was told in a number of other instructions that respondent-wife "was obliged under the law to use ordinary care for her own safety."

[22] Appellants next contend that the trial court committed reversible error in refusing to give the following instruction: "You are instructed that evidence of the oral admissions of a party, other than his or her own testimony in this trial, ought to be viewed by you with caution."

Appellants rely upon section 2061 of the Code of Civil Procedure which enumerates certain matters upon which the jury is "to be instructed by the court on all proper occasions," and subdivision 4 thereof reads: "4. That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution." Appellants state: "This instruction * * * should have been given, especially in view of the fact that the sole evidence tending to establish that defendants by their employee lighted the incinerator before the accident, is testimony as to the oral admission of Mrs. Nickerson." This statement of appellants is not correct because the record shows that aside from the admissions of Mrs. Nickerson that she had had the incinerator fire started without warning respondents, and that she felt that the explosion was her fault, there is the testimony of appellants' own witness, Douglas Felt, to the effect that he had started the fire on that Monday.

In the very recent case of People v. Koenig, 29 Cal.2d 87, 173 P.2d 1, the prosecution relied on evidence of defendant's oral admission of guilt, but the trial court failed to give an instruction to the jury to view such evidence with caution. In affirming the judgment of conviction our Supreme Court said 29 Cal.2d at page 94, 173 P.2d at page 5: "Section 2061 of the Code of Civil Procedure, subsection 4, provides that on all proper occasions the jury is to be instructed 'That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution.' No such cautionary instruction was given by the trial judge nor was one requested. It was formerly the rule that even the refusal to give such an instruction was not error on the ground that the instruction amounted to a mere commonplace statement of what every jury was believed to know. People v. Raber, 168 Cal. 316, 143 P. 317. Later the code section was held unconstitutional as authorizing comment on the evidence. Hirshfeld v. Dana, 193 Cal. 142, 223 P. 451. In People v. Dail, 22 Cal.2d 642, 140 P.2d 828, the Hirshfeld case was overruled, and it was held that the section was never unconstitutional. In the Dail case an instruction was given directly contrary to the section with respect to the testimony of accomplices. No admissions were involved. In Conger v. White, 69 Cal.App.2d 28, 158 P.2d 415, such an instruction with respect to admissions was requested and refused. The court held this refusal to be prejudicial error in view of the equivocal nature of the admissions relied upon. The admissions in the instant case, if true, were far from equivocal. In view of the code section, however, such a cautionary instruction should have been given. In view of the record in this case, however, it is improbable that had this instruction been given, the jury would have discounted this testimony to such an extent that it would have returned a different verdict."

We believe that the requested instruction should have been given, and that the failure to do so constituted error. However, whether such error is reversible error in a case depends upon the entire record in said case. In view of the record in this case, which we have read carefully, we are convinced that the failure to give the requested instruction did not constitute reversible error.

[23] Appellants' final objection to the instructions concerns the modification by the court of two instructions proposed by appellants relative to sections 6403 and 6406

of the Labor Code. In this respect they rely on the rule expressed in Hurtel v. Albert Cohn, supra, 5 Cal.2d 145, 52 P.2d 922, to the effect that the violation of a statute or ordinance constitutes negligence per se, and that such violation amounts to contributory negligence if it proximately contributes to the injury sustained. The court, however, modified the instructions so as to include only the express language of said sections 6403 and 6406, and eliminating from its charge the rather long formula instructions presented by appellants based on the Labor Code sections. The court properly modified these proposed instructions, because, first, they omitted some elements that should have been included if they were to be given to the jury, and second, they were unnecessary because the proper parts thereof were fully covered by other instructions. In fact a reading of all the entire instructions given by the court shows that the jury was fully and fairly instructed upon all phases of the case.

In view of the foregoing the judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

76 Cal.App.2d 850

In re BRAINARD'S ESTATE.

BRAINARD v. BRAINARD.

Civ. 3522.

District Court of Appeal, Fourth District, California.
Nov. 20, 1946.

1. Descent and distribution 🔑**47(1)**

Where will left all of testator's property to his surviving son and daughter-in-law, without mentioning surviving son of testator's deceased son or indicating that such omission was intentional, no settlement was made on such grandson, and he was not given any part of testator's estate by testator before his death, grandson was "pretermitted heir" of testator and entitled to inherit from him as such. Probate Code, § 90.

See Words and Phrases, Permanent Edition, for all other definitions of "Pretermitted Heir".

2. Descent and distribution 🔑**71(3)**

A petition to determine heirship should have been brought in name of alleged heir as real party in interest, instead of name of his attorney in fact. Code Civ.Proc. § 367; Probate Code, § 1190.

3. Appeal and error 🔑**1170(1)**

Where executor's first exception to petition to determine heirship on ground that it was brought in name of alleged heir's attorney in fact was made on appeal from judgment establishing heirship, executor's answer stated and hearing was had on theory that petition was that of heir, petition to probate will named such heir, and uncontradicted evidence showed that alleged heir was testator's deceased son's only child, executor was not prejudiced by failure to bring petition in heir's name. Code Civ.Proc. § 367; Probate Code, § 1190; Const. art. 6, § 4½.

4. Descent and distribution 🔑**71(1)**

An executor and his attorney, appearing at and proceeding with hearing on petition to determine heirship after posting of notices thereof by county clerk, without objecting on ground of failure to serve written notice of hearing on such attorney at least ten days before day of hearing, as required by statute, or raising any question as to sufficiency of notice, waived such notice. Probate Code, §§ 1191, 1200.

◆

Appeal from Superior Court, Fresno County; Arthur C. Shepard, Judge.

In the matter of the estate of William Brainard, deceased. On the petition of Leslie Brainard to determine heirship. From a judgment establishing that petitioner is deceased's grandson and heir at law, T. S. Brainard, executor of the estate, appeals.

Affirmed.

Claude L. Rowe, of Fresno, for appellant.

F. C. Huebner, of Fresno, for respondent.

MARKS, Justice.

This is an appeal from a judgment establishing that Leslie Brainard was the grandson and an heir at law of William Brainard, deceased.

The facts are not in dispute. William Brainard was a widower at the time of his death in December, 1944. He was the father of two sons, T. S. Brainard, who survived him, and Frank R. Brainard who predeceased his father. Leslie Brainard was the only child of Frank R. Brainard.

[1] William Brainard died testate. His will left all of his property to his son T. S. Brainard and to Vera Brainard, his daughter-in-law, wife of T. S. Brainard. No mention of Leslie Brainard was made in the will and there is nothing in the document to indicate that such omission was intentional. The evidence is undisputed that no settlement had been made on Leslie nor is it contended that his grandfather had given him any part of his estate. It is therefore clear that Leslie Brainard was a pretermitted heir and entitled to inherit as such. Sec. 90, Probate Code.

The petition to determine heirship was filed on September 21, 1945. The clerk set the petition for October 2, 1945, and caused notices of the time and place of the hearing to be regularly posted. Sec. 1191, Probate Code. There is nothing in the record to affirmatively indicate that any notice of the hearing was mailed to appellant or to his attorney other than the declaration in the judgment that notice of the time and place of the hearing had been given according to law.

The hearing was had on October 2, 1945, with both appellant and respondent appearing in person and by their respective attorneys. No question of the sufficiency of the petition was raised and no objection was made to proceeding with the hearing. There was no request for a continuance. The parties introduced their evidence and on request of the attorney for appellant the respective counsel were given time to file briefs. The decree was dated November 9, 1945, and was filed the next day.

On October 22d counsel for appellant moved to reopen the case. His main purpose was to move to strike out all of the evidence taken at the former hearing on the ground that neither appellant nor his attorney had received written notice of the time and place of the hearing of the petition. The trial judge repeatedly offered to reopen the case to permit the introduction of any evidence on the quesion of the status of respondent as an heir at law of deceased. The existence of any new evidence was not even suggested and no claim was made that Leslie Brainard was not the grandson of William Brainard and that Frank R. Brainard, the father of Leslie, had not predeceased William Brainard. The motion to reopen the case was denied and judgment in favor of Leslie was entered.

Appellant urges two grounds for a reversal of the judgment. First, he points out that the petition to determine heirship was filed by and in the name of F. C. Heubner who was the attorney in fact of, as well as attorney at law representing Leslie Brainard. Second, he argues that a written notice of the time and place of the hearing of the petition should have been served on his attorney at least ten days before the day of the hearing, relying on Section 1200 of the Probate Code. On the 22d day of October, 1945, counsel for appellant testified that no notice of the time and place of the hearing had been received by him through the mail and that none had been served on him although he was served with the petition to determine heirship.

[2, 3] It is true that the petition to determine heirship should have been brought in the name of Leslie Brainard who was the real party in interest instead of in the name of his attorney in fact. Sec. 367, Code Civil Procedure, and Sec. 1190, Probate Code. However, appellant suffered no prejudice from this error. His first exception to the petition on this ground

was made in this court. He understood the petition to be that of Leslie Brainard because in his answer he stated that he was "answering the petition of the petitioner Leslie Brainard to determine heirship." The hearing was had on the theory that the petition was that of Leslie. In the petition to probate the will of deceased, signed and verified by appellant and also signed by his attorney, in the part naming the heirs at law of deceased appears, "Leslie Brainard, Grandson, Gen. Del., Pacific Grove, California." All the evidence shows without any contradiction that Leslie Brainard is the only child of Frank R. Brainard who predeceased William Brainard. Therefore, the judgment that Leslie Brainard is an heir at law of deceased is the only one that could have been entered. Another hearing on the petition of Leslie would have the same result. Appellant was not misled and suffered no prejudice from the error and as there has been no miscarriage of justice here, we are prohibited from reversing the judgment because of an error in pleading from which appellant has suffered no injury. Sec. 4½, Article VI, Constitution.

[4] Appellant argues that section 1200 of the Probate Code requires that a written notice of the time and place of hearing the petition to determine heirship be served on his attorney at least ten days before the hearing, and as there was no proof of such service in the record the trial court had no jurisdiction to proceed with the hearing.

The first paragraph of section 1200 of the Probate Code requires the county clerk to post notices of various petitions and other matters in probate proceedings including "a petition for determination of heirship." Such notice was posted in this proceeding. See also Sec. 1191, Probate Code.

The second paragraph of the section provides that "At least ten days before the time set for the hearing of such petition, account or report, *the petitioner or person filing the account or desiring the confirmation of a report of appraisers* must cause notice thereof to be mailed * * *" to various persons. (Emphasis ours.)

While the language of the section is not as clear as might be desired it should be observed that we have involved here neither an "account" nor "a report of appraisers."

As we have already observed appellant and his attorney appeared and proceeded with the hearing without objection and without raising any question of the sufficiency of the notice of hearing. In Hammond Lumber Co. v. Bloodgood, 101 Cal. App. 561, 281, P. 1101, it is said: "It is the well-settled law of this state that, where both parties appear and contest a motion, without objection in the trial court, such appearance is a waiver of a written notice, if none were given, or of the defect in the notice to specify all of the relief asked and given, if the motion and order went beyond the terms of the notice, Acock v. Halsey et al., 90 Cal. 215, 27 P. 193; Curtin v. Dunne, 10 Cal.App. 586, 102 P. 825; Walberg v. Underwood, 39 Cal.App. 748, 180 P. 55; Brown v. Superior Court, 65 Cal.App. 147, 223 P. 426." See, also, Ross v. Thirlwall, 101 Cal.App. 411, 281 P. 714; Ocean Accident etc., Corp., Ltd., v. Industrial Accident Commission, 38 Cal.App.2d 601, 101 P.2d 704; Simmons v. Simmons, 45 Cal.App.2d 695, 114 P.2d 659; Marston v. Rood, 62 Cal. App.2d 435, 144 P.2d 863.

The judgment is affirmed.

BARNARD, P. J., concurs.

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DEAN v. DEAN.

Civ. 7257; Sac. 5767.

District Court of Appeal, Third District, California.

Dec. 2, 1946.

1. Evidence ⚿471(2)

Defendant's testimony that after entry of interlocutory decree his wife "wanted a reconciliation", that they "decided on a reconciliation", that they "had another reconciliation", and that he told his wife he "was agreeable to a reconciliation", and that she told him that she approved, was merely an expression of his conclusions and was not competent to establish a reconciliation.

2. Divorce ⚿156

Evidence that husband and wife, after entry of interlocutory decree of divorce, slept together on certain occasions, in the absence of any evidence to show that they ever resumed the normal way of life of a married couple, did not establish a full and complete reconciliation so as to warrant denial of entry of final decree. Civ.Code, §§ 116–118.

3. Divorce ⚿156

Husband's testimony that he procured a total stranger and husband's sister to invade privacy of the marital chamber for purpose of seeing the parties in bed together, because wife was denying that any reconciliation had taken place after entry of interlocutory decree, established that husband himself knew that there had not been a complete, if any, reconciliation which would defeat entry of a final decree. Civ.Code, §§ 116–118.

4. Divorce ⚿156

In divorce action, after entry of interlocutory decree and the expiration of one year, burden is upon defendant, in order to defeat right of plaintiff to a final decree, to show a bona fide reconciliation and condonation of past offenses followed by the restoration of defendant to all marital rights with the intention that thenceforth the parties should live together as husband and wife. Civ.Code, §§ 116–118.

Appeal from Superior Court, Solano County; Joseph M. Raines, Judge.

Action by Mary J. Dean against James E. Dean for divorce, wherein defendant cross-complained. An interlocutory decree was awarded to plaintiff and plaintiff moved for entry of a final decree. From an order denying a final decree and removing the community property from the restrictions imposed by the interlocutory decree, plaintiff appeals.

Order reversed with directions to trial court to enter final decree.

Sefton & Quattrin, of San Francisco, for appellant.

Henry W. Mahan, of Benicia, for respondent.

ADAMS, Presiding Justice.

Appellant and respondent were married in February, 1921, and separated for the last time about June 1, 1943. On the 27th day of September, 1944, plaintiff was granted an interlocutory decree of divorce from defendant upon the ground of his extreme cruelty. The action was tried upon the amended complaint of appellant, a cross-complaint filed by respondent, and an answer thereto. The findings of the trial court as to acts of cruelty on the part of respondent were that on several occasions he had threatened to do bodily harm to, and even to kill relatives of his wife; that on one occasion he threatened to throw them out of the family home; that on several occasions he threatened to kill plaintiff; that he humiliated and offended plaintiff in the presence of friends and relatives by calling her insulting and vile names; that on several occasions he stayed out all night and told plaintiff it was none of her business where he had been; that he made familiar remarks to boarders and visitors; and that he threatened to send plaintiff to a state insane asylum and in July, 1943, filed a petition for that purpose, which petition, after hearing, was dismissed. Allegations in defendant's cross-complaint as to cruelty on the part of plaintiff were found to be untrue.

Regarding the property of the parties it was found to be community and included a home in Benicia which home, together with the furniture and furnishings thereof, was, by the interlocutory decree, set apart for plaintiff, subject to further order of the court, a room therein being reserved for the use of defendant, conditioned on his good behavior. Defendant was ordered to pay off certain debts, including attorney's fees, and also to pay $10 per week for three months to allow his minor daughter to complete a business course; and the court reserved the right to make a further order for the payment of $600 due plaintiff under a prior order of the court. Other property was divided equally between the parties.

On September 29, 1945, plaintiff filed an affidavit in support of motion for a final decree of divorce, which included an allegation that the parties had not become reconciled and that no appeals had been taken from the interlocutory decree or other orders of the court. The record contains no counter affidavit by respondent on plaintiff's motion though it is recited that one was filed. On October 31, 1945, the trial court, after a hearing on plaintiff's motion, made an order finding that there had been "full and complete reconciliation of said parties" since the making of interlocutory decree, and that since that date the parties had "lived and cohabited together as husband and wife, with the intent and purpose thereby to thenceforth live together as husband and wife." Plaintiff's motion for a final decree was denied and it was ordered that the real property in controversy be released from all terms of the interlocutory decree, subject to a lien "on defendant's interest therein" for certain specified sums previously ordered to be paid for attorney's fees and costs.

This appeal is from the aforesaid order, it being contended by appellant that the evidence adduced at the hearing, viewed in the light most favorable to respondent, does not show a reconciliation as a matter of law and that the trial court erred in so holding; and that it abused its discretion in deciding in favor of defendant. This calls for some review of the evidence.

Mrs. Dean testified in support of her motion that she had never resumed marital relations with Mr. Dean, had never displayed any affection for him, had not cared for his personal needs, had never become reconciled to him, and did not wish to live with him as husband and wife, and that Dean had not since the interlocutory decree given her any money for her support.

Dean, testifying in opposition to plaintiff's motion, stated that about March 3, 1945, when he returned to the home after several months' absence, Mrs. Dean called him into the kitchen and "wanted a reconciliation"; that she said she did not think it was right for the court to sell the property, and they agreed that they could get more for it if they fixed it up a little bit, and they agreed that he would put in a month's labor and she would pay for the materials, and then they would put it up for sale; that he stayed there that night, but not with Mrs. Dean, but that the next night "we decided on a reconciliation," and he stayed with her that night and until about June 3rd; that about June 8th and June 13th they "had another reconciliation" and cohabited in the same room as the previous time for about five days, when trouble started between them about a young girl in the house. He said that he had told his wife "he was agreeable to a reconciliation" and she told him that met with her approval; that he had a garage down at Redwood City that took most of his time away but that he "regarded the situation as one of man and wife" up until about June 15th. On cross-examination he said they were not in a state of reconciliation and had had no marital relations since June 13th, and that since then there had not been a great deal of affection displayed by his wife, though she had cooked several meals for him and he had cooked several for her, and they had done laundry for one another; but that Mrs. Dean had not eaten with him. He stated that on April 13th he had a witness who saw him in bed with Mrs. Dean; that his name was Walsh, he thought, and he had a room in the house; that at that time his wife wanted to deny that they had had a reconciliation so he hired Walsh to go in and see them in bed together; that he wanted a witness because Mrs. Dean had gone to her attorney and they wanted him to fix up the house "and then I could get out." Walsh was not produced as a witness and Dean admitted that he had known him only about two days.

Defendant called as a witness his sister, Mrs. March, who testified that on or about June 11th Dean called her at Berkeley and asked her to come to Vallejo which she did; that she arrived there about 9:00 o'clock at night and was met by Dean who told her that there had been a hearing and Mrs. Dean had denied that there had been a reconciliation and he wanted her as a reliable witness; that they went to the Dean house, where she slept in a back room, and that the next morning about 5:00 o'clock, while it was still dark, she walked down the hall to the room Dean had told her he and his wife occupied, and saw them in bed together; that she then left between 5:00 and 6:00 o'clock a. m., and took the bus to Vallejo.

[1-3] While the testimony of defendant taxes one's credulity, taken at its face value it amounts to no more than that he and Mrs. Dean slept together at different times between March 5th and June 15th. His testimony that Mrs. Dean "wanted a reconciliation," that about March 5th they "decided on a reconciliation" and that on June 8th and 13th they "had another reconciliation," that he told his wife he was agreeable to a reconciliation and Mrs. Dean told him that met with her approval, are no more than conclusions of the witness. See Kronman v. Kronman, 129 Cal.App. 10, 15, 18 P.2d 712; Ruggles v. Bailey, 15 Cal.App.2d 555, 557, 59 P.2d 837; Keller v. Keller, 122 Cal.App. 712, 715, 10 P.2d 541. And unless it can be said that the evidence of cohabitation—though specifically denied—constituted "the full and complete reconciliation" found by the court, such finding is without support in the record. It is to be noted that there is no testimony aside from testimony that the parties slept together to show that they ever resumed the normal way of life of a married couple. There is no evidence that they ate together at the same table, that Mrs. Dean performed for respondent the usual household duties performed by a wife for a husband, that they evidenced any affection for one another, performed for one another any acts of conjugal kindness, went out together, were seen together by relatives or friends or by others residing in the house, told anyone they had become reconciled, or that Dean assumed any duties of a husband by way of rendering any services to his wife or contributing anything to the household expenses; and there is nothing stated as to any agreement on the wife's part to condone the offenses of which the trial court found him guilty on granting the interlocutory decree. Furthermore, respondent's own testimony that he secured a total stranger to invade the privacy of the marital chamber for the purpose of seeing the parties in bed together, and his procuring his sister to come to the home secretly in the night for a like purpose because Mrs. Dean was denying that any reconciliation had taken place, show not only a complete disregard for the privacy of the marital relations, but indicates that Dean himself knew that there had not been a complete, if any, reconciliation. Also the very purpose for which, as he states, a reconciliation was agreed upon, was to prevent the sale of the house by order of court, in its then condition, and to secure a better price therefor by making certain repairs. And he testified to nothing indicating any intention on the part of Mrs. Dean to abandon her right to a final decree of divorce or to restore him to marital rights.

The record in the case shows that after the interlocutory decree several orders to show cause were issued at the request of plaintiff, or her attorney, one on November 13, 1944, in support of which an affidavit was filed alleging that defendant had not made the payments ordered by the court and had collected rental from the premises awarded to plaintiff; and another on February 7, 1945, supported by an affidavit of plaintiff that defendant had not made the payments ordered, that he had not taken employment as agreed, and that he had remained in the home and harassed and annoyed her. Hearings on these orders were continued from time to time and were pending undisposed of up to the actual time of the hearing on motion for a final decree.

Evidence introduced in rebuttal by plaintiff consisted of testimony of the two sons of the parties, and three persons who resided in the house as boarders or roomers. One of said roomers testified that she was in the house from the middle of April until early in July and that she never saw any display of affection between husband and wife, and that they did not, that she knew of, occupy the same room. Another roomer who had been there since July stated that he had noticed friction between the parties, that there was no love, but "strictly an antagonistic attitude." Another testified that she was in the house from December on; that Mrs. Dean acted "very nice and polite," but that "he was continually raving all the time." This witness further testified that she never saw Dean until she had been in the house about four months, and that during the period when respondent contends he was sleeping with Mrs. Dean, the latter was actually sleeping with the witness, sometimes in Mrs. Dean's room and at other times in the girl's room across the hall. One of the sons of the parties testified that he returned home after army service the first week in July and that he had seen "nothing more than a stiff antagonism, and open antagonism" between his parents. Another son testified that he was in his parents' home in May for one night, and had been there continuously since July, and that he observed between his father and mother the "same friction that has existed for years, always bickering with each other."

From the over-all picture thus presented we think that the trial court erred as matter of law in finding that there was a reconciliation between the parties. In Hawkins v. Hawkins, 104 Cal.App. 608, 286 P. 747, it was contended by the defendant in his answer to plaintiff's complaint for divorce that plaintiff had condoned the offenses for which she sought her divorce. This court said, at page 611 of 104 Cal. App., at page 748 of 286 P.: "The most that may be said regarding the issue of condonation in the present case is that the spouses discussed a reconciliation of their domestic troubles; that the respondent agreed to condone her husband's offenses and return to him 'for the sake of the children,' and that they went together to a show and slept together one night in a hotel. We are of the opinion this does not have the effect of consummating condonation." Also it said: "But assuming that the statement which was testified to by the appellant that they agreed 'to condone and to resume marital relations' sufficiently fulfills the requirement of the statute with respect to reconciliation and remission, still there is an absence of evidence of 'restoration of the offending party to all marital rights,' unless it may be said that a single act of cohabitation of the spouses, which is accomplished in the rented room of a hotel, fulfills this requirement. We think it is insufficient under the circumstances of this case to constitute a consummation of condonation. The statute requires a restoration to all marital rights. It is not claimed there was a restoration to any marital rights in the present case, except the right of cohabitation on a single occasion. There is a clear distinction between the ordinary construction of the term 'marital relations' and the statutory term of 'all marital rights.' The conjugal rights of married persons include the enjoyment of association, sympathy, confidence, domestic happiness, the comforts of dwelling together in the same habitation, eating meals at the same table, and profiting by the joint property rights as well as the intimacies of domestic relations. It has been repeatedly held that condonation of acts of extreme cruelty is not accomplished by sexual intercourse alone." (With citations.)

In Bohnert v. Bohnert, 95 Cal. 444, 446, 30 P. 590, which was cited in the Hawkins case, the court said that "restoration of the offending party to all marital rights" (Civ. Code, sec. 116) is not proved by evidence of sexual intercourse alone.

Civil Code section 116 provides that it is necessary to the condonation of matrimonial offenses that the offending party be restored to "all marital rights"; section 117 provides that condonation implies a condition subsequent—that the forgiving party must be treated with conjugal kindness; and section 118 recites that where the cause for divorce consists of a course of offensive conduct, or arises, in cases of cruelty, from excessive acts of ill-treatment which may, aggregately, constitute the offense, cohabitation, or passive endurance, or conjugal kindness shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone.

In re Estate of Martin, 166 Cal. 399, 402, 137 P. 2, where it was contended that there had been condonation and a reconciliation between decedent and his divorced wife after the interlocutory decree, the court said that visits of the husband to the wife, letters written by him to her in endearing terms and expressing a desire to come back to her, the sending of money to her and the payment of her bills, together with sexual intercourse between the parties, was insufficient to amount to an abandonment of the divorce proceeding by the husband.

In Keller v. Keller, 122 Cal.App. 712, 715, 10 P.2d 541, 542, where there was evidence that after an interlocutory decree of divorce the parties occupied an apartment together and conjugal intimacies were permitted by the wife, the court said that this would not be a controlling circumstance (citing Hawkins v. Hawkins, supra); and that there where the parties were of mature age and had no children, and the wife at the hearing had expressed her irrevocable determination not to live with defendant again, and where ground for divorce had been established by an interlocutory decree which had been unassailed until the application for a final decree, "the courts then have their duty to abide by their records and follow the written law, unless there is *clear and cogent proof of reconciliation and resumption of connubial relations,* or some other legal ground for denying dissolution of the marriage." (Italics ours.) And it was there said, quoting from Drew v. Drew, 250 Mass. 41, 45, 144 N.E. 763, that "Reconciliation, like condonation, is a state of mind to be determined from all the evidence including rational inferences." And in Estate of Boeson, 201 Cal. 36, 255 P. 800, it was said, at pages 42, 43 of 201 Cal., at pages 802 of 255 P., that "Before a court may indulge in a presumption of revocation, however, the evidence offered to establish full resumption of marital relations must be sufficient to satisfy the mind of the court that such was the intent of the parties." The testimony that was relied upon as sufficient to show a resumption of such relations was that of the wife (who claimed reconciliation) that at the time the interlocutory decree was granted she was residing in a seven-room house which she owned as her separate property; that she continued to reside in said house after the granting of the decree, renting all rooms in the house, except the dining-room and kitchen, to tenants; that she and decedent became reconciled about September, 1921; that decedent did not make his home with her because of the crowded conditions of her living quarters, but that he visited her, sometimes as frequently as two or three times a week, upon occasions took her to theaters, ate meals with her at her residence and occasionally spent the night with her there; that it was the mutual desire of decedent and herself that she should sell her house and that they should then build a cottage at Palo Alto, where she believed her health, which was poor, would improve; that she did not wish to reserve a larger number of the rooms in her house for her own use so that her husband might live with her, because she believed that the house would sell more readily if most of the rooms were rented, and that decedent offered to contribute to her support, but she refused his offers because she wished him to save as much as possible to be used later in building the house at Palo Alto. She also produced four witnesses who testified that they had seen the husband about appellant's house, eating with her, hanging pictures and otherwise conducting himself in a manner which would indicate that they had resolved their matrimonial differences. The court said, at page 45 of 201 Cal., at page 803 of 255 P.: "Giving the fullest effect possible to the facts testified to by appellant, it appears from her testimony that she and decedent had not established a matrimonial domicile at the residence owned by her or at any other place. The fact that decedent on occasion spent the night with appellant at said residence and upon occasions ate meals with her there and assisted her in making minor repairs about the premises does not establish said residence as the matrimonial domicile of the parties. * * * While the lack of a fixed joint domicile will not under all circumstances prevent the existence of a state of marital cohabitation, it is a factor to be considered."

[4] In the case before us the burden was upon defendant, in order to defeat the right of plaintiff to a final decree, to show that there had been a bona fide reconciliation and condonation of past offenses, followed by the restoration of defendant to all marital rights with the intention that thenceforth the parties should live together as husband and wife. In our opinion defendant failed to meet this burden, and plaintiff is entitled to a final decree of divorce as prayed.

The order appealed from is reversed with directions to the trial court to enter such final decree.

PEEK and THOMPSON, JJ., concur.

77 Cal.App.2d 106

HEFFERNAN v. MERRILL ESTATE CO.

Civ. 7269.

District Court of Appeal, Third District, California.

Dec. 2, 1946.

Hearing Denied Jan. 30, 1947.

1. Brokers 🔑44

Where contract for employment of real estate broker specified no time for performance and property owner revoked the employment in good faith and withdrew the property from the market before the written contract to buy was signed by proposed purchasers procured by broker, and the property was not sold, broker was not entitled to commissions. Civ. Code, § 2356.

2. Brokers 🔑10

A property owner who has not contracted to employ a broker for any specified period of time may revoke the employment of broker and terminate the agency at any time before it is consummated. Civ.Code, § 2356.

3. Brokers 🔑50

Where the time for performance is definitely fixed by the contract, the transaction must be completed within that designated time to entitle the broker to his commissions.

4. Brokers 🔑44

In the absence of language in broker's contract granting a specified time within which to perform, the owner may revoke his agency at will, but such revocation must be made in good faith, and not for purpose of taking advantage of the broker's services or for purpose of escaping payment of commissions. Civ.Code, § 2356.

Appeal from Superior Court, Placer County; Lowell L. Sparks, Judge.

Action by John J. Heffernan against Merrill Estate Company for real estate broker's commission. Judgment for plaintiff, and defendant appeals.

Reversed with directions.

Clarence A. Shuey and Robert W. Harrison, both of San Francisco, and T. L. Chamberlain, of Auburn, for appellant.

Morse & Richards and Stanley C. Smallwood, all of Oakland, for respondent.

THOMPSON, Justice.

The defendant has appealed from a judgment of $2,375, which was rendered in favor of plaintiff, a real estate broker, for procuring a purchaser of real property who was willing and able to buy it on the terms of the listing thereof, but who failed to sign an agreement to purchase until after the owner withdrew it from the market.

The appellant contends that the findings and judgment are contrary to law and not supported by the evidence; that the letters of correspondence between the parties do not constitute an agreement of employment because the offer of employment was not accepted by the broker; that plaintiff failed to perform his obligation so as to entitle him to commissions for the reason that an agreement in writing to purchase the land was not signed until after the defendant revoked the listing of the property and withdrew it from the market, and that the action is barred by the statute of frauds.

The defendant is a corporation which owns the real property involved in this suit situated at Lake Tahoe in Placer County. The plaintiff is a licensed real estate broker. Both parties maintain their offices in Oakland. The complaint alleges that the defendant "listed said real property with plaintiff for sale by a written instrument dated March 7, 1944, wherein said property was listed for sale at a price of $22,500.00; that thereafter and on the 14th day of March, 1944, defendant by a written instrument listed said real property with plaintiff for sale at a price of $23,750.00 and agreed therein to pay plaintiff a commission of ten per cent (10%) of the selling price as a real estate broker's commission." The letters do not designate the duration of employment. The written instruments referred to in the complaint, upon which the plaintiff relies as fulfillment of the statute of frauds (Civil Code, sec. 1624), consist of letters addressed to plaintiff and signed by the defendant. They read in part:

"March 7, 1944.

Mr. John J. Heffernan
Brockway, California.

Re: Property at Tahoe, California

Dear Sir:

Please refer to our letter of June 9, 1942, in regard to sale of our property at Lake Tahoe. This is to advise that the boat, referred to therein, has been sold. The boat house on the wharf has been removed, and we are now offering the place for Twenty-Two Thousand Five Hundred ($22,500.00) Dollars. * * *."

"March 13, 1944.

Mr. Jack Heffernan,
c/o Clyde L. Sweet,
5233 College Avenue,
Oakland, Calif.

Re: Property at Lake Tahoe

Dear Mr. Heffernan:

Referring to your telephone conversation, this is to inform you that the property of the Merrill Estate Company at Lake Tahoe, adjacent to Tahoe City, is now offered for sale, or rent, for the 1944 season. The property includes * * * [Here follows description of the property in question.] * * *

The price of the entire property is Twenty-Two Thousand Five Hundred ($22,500.00) Dollars. * * *."

"March 14, 1944.
(In Ink: ST 8280 June 5th)

Mr. Jack Heffernan,
c/o Clyde L. Sweet,
5233 College Avenue
Oakland, California

Re: Property at Lake Tahoe

Dear Mr. Heffernan:

Please refer to our letter of March 13, 1944. Since writing that, we have decided we will pay a 10% commission on the Tahoe property. When giving you a price of $22,500.00, we had in mind a commission of 5%. We are also changing our asking price to $23,750.00, which includes a 10% commission.

Will you kindly make note of this and oblige."

A previous letter was also received by plaintiff. It reads in part:

"June 9, 1942.

Mr. John J. Heffernan,
Brockway, California.

Dear Sir:

This is to inform you for your listing that the property of the Merrill Estate Company at Lake Tahoe, adjacent to Tahoe City, is now offered for sale or rent, for the 1942 season. * * *

The present price of the property, houses, pier and boat is $33,000.00. The property, buildings and pier without boat are presently priced at $25,000.00, and the boat alone at $10,000.00. The rental for the season is $700.00 per month, excluding use of boat. Rental of boat is $300.00 per month. * * * *If interested, please communicate with us* at the above address, or by phone—Sutter 8280." (Italics added.)

Confirming a telephonic communication to plaintiff from Mr. Merrill, Jr., on May 29, before the prospective purchaser had signed an agreement to buy the land, which message instructed plaintiff that the property was not for sale and that it was withdrawn from the market, defendant sent the following letter of withdrawal, which was erroneously dated May 30:

"May 30, 1944.

Mr. Jack Heffernan,
c/o Clyde L. Sweet,
5233 College Avenue,
Oakland, California.

Dear Mr. Heffernan:

We refer to our letters of March 7th and March 14th listing our property at Lake Tahoe adjacent to Tahoe City. We have decided to withdraw the property from the market for the time being, so will you please be good enough to remove it from your listing? If, however, you should have any clients who would be interested at any time we would be glad to discuss the possible sale at a later date. * * *"

The proposed employment was not accepted in writing by the broker.

Findings were adopted by the trial court determining that plaintiff accepted employment by the defendant and fulfilled the contract by securing purchasers of the real property who were ready, willing and able to buy it on the terms specified in the listing offer; that the employment was not revoked prior to the execution of the written agreement of purchase, and that plaintiff is therefore entitled to his commissions amounting to the sum of $2,375. Judgment was rendered accordingly.

[1] We are impelled to hold that the findings to the effect that a contract of employment as broker, assuming, without so deciding, that the letters constituted a binding agreement, was not fulfilled for the reason that the employment was revoked in good faith and the land was withdrawn from the market before the written contract to buy it was signed by the proposed purchasers. Gunn v. Bank of California, 99 Cal. 349, 33 P. 1105; Williams v. Freeman, 35 Cal.App.2d 104, 108, 94 P.2d 817; Merkeley v. Fisk, 179 Cal. 748, 178 P. 945; Civil Code, sec. 2356; 12 C.J.S., Brokers, § 66, at page 150; 8 Am.Jur. 1008, sec. 41; 24 A.L.R. 1538, note. The leading case of Gunn v. Bank of California, supra, appears to be determinative of the chief issue in this case. The listing of the property for sale, in this case, specified no fixed period of time for performance. We must assume the defendant acted in good faith in revoking the offer for sale and in taking the property off of the market. It appears without conflict that was done for the reason that the Merrills desired to use it as a summer home. It was not subsequently sold by the defendant to escape payment of commissions, or at all. It is still retained and owned by the defendant. The evidence is uncontradicted that plaintiff was notified, after a previous warning to that effect, to take the property off of the market before the prospective purchasers, Mr. and Mrs. Cupps, signed a written agreement to buy it. They were never introduced to the owners. The finding of the trial court to the contrary is therefore not supported by any evidence.

The plaintiff testified that the written agreement to purchase the land was not signed until after he was notified by the defendant that the property was not for sale and after he was instructed to take it off the market. He said in that regard that he "did not advertise the property for sale," but that Mr. and Mrs. Cupps came to his office in Oakland on May 22, 1944, to inquire regarding the terms of sale, and after being informed of the terms contained in the listing instructions, they said they would buy it "if it was as represented," but that they wanted to see the property; that he then telephoned Mr. Merrill, Jr., on May 27, telling him he had prospective purchasers who wanted to inspect the property, and asked him to authorize the caretaker at Lake Tahoe to show them the place; that Mr. Merrill, Jr., replied that they had no objection to their viewing the property, but that before it was sold his father, Mr. Merrill, Sr., "would have to pass on the matter." That was a clear warning to the plaintiff that it might be useless for the Cupps to go to Lake Tahoe to inspect the property.

The plaintiff again testified on cross-examination, regarding the foregoing conversation, that Mr. Merrill, Jr., then said, when he was told of the prospective sale, "that was fine, * * * but if the deal was made it would be Mr. Merrill, senior [who] would have to pass on the deal." The plaintiff further testified that Mr. and Mrs. Cupps thereafter went to Lake Tahoe on Saturday, May 27, and were furnished a key to the dwelling house by Mr. Anderson, the caretaker; that they inspected the property on both Saturday and Sunday; that the Cupps returned to his office in Oakland on Monday forenoon, May 29, and told him they would "take the property at the price specified", and then gave him a deposit of $1,000; that he promptly telephoned Mr. Merrill, Jr., of the agreed sale and deposit, but he was then informed "he [Merrill, Jr.] would have to discuss the matter with his father"; that after about 15 minutes had elapsed Mr. Merrill, Jr., called him on the telephone again and informed him that he had discussed the proposed sale with his father who "decided not to sell the property, and wished to remove it from the market." After that definite notice had been received the plaintiff drew a written agreement to purchase the property on the terms of listing, which Mrs. Cupps subsequently signed in behalf of herself and her husband. The plaintiff testified in that regard: "Q. (Mr. Chamberlain) Then this instrument was actually signed after you had been notified by Mr. Merrill that the property would not be for sale? A. Yes."

Mr. and Mrs. Cupps corroborated plaintiff in many respects. There is no evidence to the contrary. Mr. Merrill, Jr., testified that plaintiff had been furnished a "listing" of the property some four years prior to May, 1944; that plaintiff had never furnished the defendant with any prospective purchaser before the week beginning May 22, 1944; that the first time plaintiff called his attention to the prospect of selling the property to Mr. and Mrs. Cupps, Mr. Merrill, Jr., told him that if a sale could be made it would have to be subject to his father's approval; that he did tell plaintiff, about May 27, he would authorize the caretaker to permit them to look at the property, but then notified plaintiff that if they desired to buy it, his father "would have to pass on the matter"; that when plaintiff informed him on Monday, May 29, that the Cupps would purchase the property on the terms mentioned in the previous listing, he again told him it would not be sold except with his father's consent; that he immediately consulted with his father and they decided not to sell the property for the reason that his father had been using it as a summer home and expected to continue to do so; that within 15 minutes after the telephone call from plaintiff, Mr. Merrill, Jr., called him again and definitely told him the property was not for sale, and requested him to take it off of the market. There is nothing in the record to show that the Merrills were not in good faith in refusing to sell the property and in revoking plaintiff's former employment as a broker, if he was so validly employed. The defendant did not subsequently sell the property. So far as the record discloses, the Merrills still own and use the place as a summer home. The Merrills never saw or discussed the sale with the Cupps. After failing to secure the defendant's Tahoe property, Mr. and Mrs. Cupps purchased from another owner the Pomin Resort at Lake Tahoe for $85,000.

[2] According to the great weight of authority, an owner of real property who has not contracted to employ a broker for any specified period of time may revoke the employment and terminate the agency at any time before it is consummated. 8 Am.Jur. 1008, sec. 41. Section 2356 of the Civil Code provides in part: "Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated by: (1) Its revocation by the principal; (2) his death; or, (3) his incapacity to contract. * * *"

The plaintiff in this case admitted that he had personal notice of the revocation of his alleged agency, and a request to take the property off of the market, before the written agreement of the prospective purchasers was executed. The transaction was never consummated. The terms of plaintiff's employment were not fulfilled before the revocation of his agency.

The correspondence in the present case amounted to no more than an unilateral offer to sell on the part of the owner, which did not grant a specified time for performance by the broker. The authorities hold, under such circumstances, that the owner may revoke in good faith his offer at any time before complete performance of the broker by procuring a binding sale to one who is willing and able to purchase the property on the terms specified, and by securing the purchaser's written agreement to that effect. Brown v. Pforr, 38 Cal. 550; Roth v. Moeller, 185 Cal. 415, 197 P. 62; Cadigan v. Crabtree, 179 Mass. 474, 61 N.E. 37, 55 L.R.A. 77, 88 Am.St.Rep. 397; Cadigan v. Crabtree, 186 Mass. 7, 70 N.E. 1033, 66 L.R.A. 982, 104 Am.St.Rep. 543; Sibbald v. Bethlehem Iron Co., 83 N.Y. 378, 38 Am.Rep. 441; 24 A.L.R. 1538, note.

In the Gunn case, supra, judgment for the plaintiff, broker, was reversed for lack of performance in failing to procure a written agreement from the proposed purchaser to buy the land, or to present him to the owner so that it could procure a binding contract therefor, before the offer to sell was rescinded by the owner. The Supreme Court said, at page 354 of 99 Cal., at page 1107 of 33 P.: "The right of plaintiff to the agreed compensation depends upon the performance of his contract to procure a purchaser, and as he did not do this, and defendant neither waived nor prevented such performance, he has not earned his commission."

With relation to the broker's failure to fully perform, the court said, at page 351 of 99 Cal., at page 1106 of 33 P. of that decision: "It is conceded that Keating was financially able to pay the price he orally agreed to pay for the land, but he signed no contract which bound him to complete the purchase * * * and plaintiff did not introduce him to Brown, or inform him who was the purchaser referred to in the above letter. * * * The contract of the broker is to negotiate a sale; that is, to procure a valid contract to purchase, which can be enforced by the vendor if his title is perfect, or if he does not procure such contract, to bring the vendor and the proposed purchaser together, that the vendor may secure such a contract."

In Auerbach v. Internationale Wolfram Lamper Aktien Gesellschaft, C.C., 177 F. 458, 462, the right of an owner of property to revoke the unilateral contract of employment of a broker, in which there is no specified time of performance expressed, is upheld in the following pertinent language: "It is a vexed question whether an agency of this sort, which is fixed in time, may or may not be repudiated by the principal in the absence of an express promise by the agent to perform any services. It is, of course, obvious that, in the absence of some implied promise at the inception of the contract, it is only a unilateral promise and the principal may withdraw his offer, whenever he pleases; and it is well settled that, where the contract is not for a fixed time, he may do so (citing authorities). * * * It is an error to suppose that the subsequent part performance of the conditions of a unilateral promise create an obligation. Either it is given at the outset for a counterpromise or it is given for the performance of the acts specified. Although the results are often unjust, they should not pervert the rectitude of such fundamental principles of law as those controlling the creation of contract obligations."

In 2 Mechem on Agency, 2d Ed., p. 2046, sec. 2449, it is said: "Where there has been no contract between the principal and the broker that the latter shall have some particular time within which to find a purchaser, it is, as a general rule, entirely competent for the principal to revoke the authority without liability at any time before it is performed. If it be regarded as a mere employment at will, it could be so terminated. If the transaction be regarded as an offer to the broker to pay him if he will perform a certain act, namely, find a purchaser, the offer may be withdrawn by the principal without liability at any time before its acceptance by the performance of the act. The only thing which would prevent revocation or withdrawal would be performance. It would make no difference that much time had been spent or that the performance was great; unless the act could be regarded as at least practically performed, the principal might revoke without liability. What would be regarded as the finding or producing of a purchaser so as to constitute performance has already been considered."

[3] Where the time for performance is definitely fixed by the contract, the transaction must be completed within that designated time to entitle the broker to his commissions. In 2 Mechem on Agency, page 2026, section 2439, it is said in that regard: "It is also indispensable that the purchaser should be found within the time limited, for if the broker's exertions do not produce the buyer until after that time has expired, it is not enough, even though that buyer may subsequently become the purchaser, unless the principal has caused the delay, or unless he waives it."

Regarding the question as to what constitutes performance on the part of a broker so as to entitle him to his commissions, in the absence of more specific conditions expressed in the contract, the last cited authority says in Volume 2, page 2003, section 2431: "(1) If the broker has obtained from a proper person and delivered to his principal a written *contract* to purchase, or—since he may not be authorized to sign a written contract—a written *offer* to purchase which the principal can immediately turn into a written contract by accepting it, he would ordinarily be deemed to have performed his undertaking. (2) When the broker has brought forward, or designated and put the principal into communication with, a suitable person to whom the principal may sell in the ordinary course of business, he has, by the weight of authority, performed his undertaking, even if, through no fault of the broker's, the buyer is not accepted."

In the present case the broker did not obtain a written, enforceable contract to buy the land until after he had been informed by the owner that the land was not for sale. There is no evidence of bad faith on the part of the owner in revoking the broker's employment and taking the property off of the market. The broker never did bring his customers face to face with the defendant so that a binding contract could be procured.

The California authorities hold, under such circumstances, that the broker failed to fully perform his undertaking in the unilateral contract of employment, and that he is therefore not entitled to his commissions.

In the cases, including Houston v. Williams, 53 Cal.App. 267, 200 P. 55, and Blumenthal v. Goodall, 89 Cal. 251, 26 P. 906, relied upon by the respondent, on the question of performance which may entitle a broker to his commissions, the contracts of employment invariably granted the brokers specified periods of time within which to perform. In the Blumenthal case the contract of employment of the broker provided that "This contract to be in force for ten days from date hereof." Quoting with approval from Section 209 of Mechem on Agency, the court said: "'It [the right to revoke] is entirely consistent with the existence of the power that the principal may agree that for a definite period he will not exercise it, and for the violation of such an agreement the principal is as much liable as for the breach of any other contract.'"

The court concluded that the broker, having procured a purchaser within three days of the execution of the contract, and prior to its revocation, "had placed the matter in the position that success was practically certain and immediate, and it would be the height of injustice to permit the principal *then* to withdraw the authority and terminate the agency *as against an express provision of the contract.*" (Italics added.)

In the Houston case, supra, judgment for the plaintiff broker was affirmed. The contract of employment gave the broker 90 days within which to procure a purchaser. He procured a purchaser on the terms specified in two months and 17 days thereafter. The appellant, however, had sold the property to another party, and refused to pay the commissions. The court held that since the contract specifically gave the broker 90 days to procure a purchaser, and he knew the broker had a prospective purchaser who was likely to buy the land, the owner could not revoke the agency within that period and escape liability for the agreed commissions. The court said in that regard [53 Cal.App. 267, 200 P. 59]: "By selling to another within the prescribed period he [the owner] necessarily violated this provision of the contract, and was liable for the commission since the agent performed his agreement."

The other cases relied upon by respondent are similarly distinguishable from the present case.

[4] There is another exception to the previously announced rule that, in the absence of language in the contract granting a specified time within which to perform, the owner may revoke his agency at will. That exception is that the revocation must be made in good faith. The owner may not take advantage of the broker's services in procuring a prospective purchaser, and then revoke his agency so as to personally consummate the sale, or for the mere purpose of escaping payment of the agreed commissions.

But the defendant in this case was guilty of no such bad faith or conduct. The agency was revoked, after fair warning, because Mr. Merrill, Sr., desired to continue to use it, as he had in the past, for his summer home. The defendant did not sell the property to any other purchaser. We must assume the Merrills still own and use the Tahoe property. The revocation of employment of the broker was in good faith.

For the foregoing reasons the judgment is reversed and the trial court is directed to render judgment for the defendant.

ADAMS, P. J., and PEEK, J., concur.

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RAINE v. SPRECKELS et al.

Civ. No. 12859.

District Court of Appeal, First District,
Division 2, California.

Dec. 3, 1946.

Hearing Denied Jan. 30, 1947.

1. Contracts 🔑91

Whether there is a sufficient consideration to support a contract is a question of fact.

2. Contracts 🔑54(1)

The sufficiency of a purported consideration for a contract must be determined from the facts of the transaction as they existed when contract was made rather than by subsequent developments.

3. Appeal and error 🔑1002

Where question of sufficiency of consideration for contract rests wholly upon the construction of the evidence which is conflicting, a verdict will not be disturbed on appeal.

4. Appeal and error 🔑996

Where the facts established may reasonably authorize opposite inferences and trial court has adopted one and rejected the other, its decision is binding upon District Court of Appeal.

5. Appeal and error 🔑989

In considering an attack upon trial court's findings of fact, the test is not how appellate court would find the facts to be, but whether there was substantial evidence strong enough to justify the conclusion reached.

6. Fraudulent conveyances 🔑61, 74(1)

In order for a creditor to prevail in suit under statute to have allegedly fraudulent transfers by debtor set aside, there must be a concurrence of want of consideration and insolvency. Civ.Code 1937, § 3442.

7. Fraudulent conveyances 🔑300(1)

Evidence was sufficient to support finding that allowance of $2,500 a month by husband to wife to run household was an amount commensurate with husband's station in life, so that the entire allowance was supported by consideration and none of it could be set aside on ground that it constituted a transfer to wife in fraud of husband's creditors. Civ.Code 1937, § 3442.

◆

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by B. F. Raine against Rudolph Spreckels and Eleanor J. Spreckels to set aside allegedly fraudulent transfers to defendant Eleanor J. Spreckels from defendant Rudolph Spreckels. From a judgment in favor of defendants, the plaintiff appeals.

Affirmed.

Keyes & Erskine, Louis Ferrari and G. D. Schilling, all of San Francisco, for appellant.

Cushing & Cushing, of San Francisco, for respondent Rudolph Spreckels.

Brobeck, Phleger & Harrison, of San Francisco, for respondent Eleanor J. Spreckels.

GOODELL, Justice.

This appeal was taken from a judgment in favor of the defendants in a creditor's suit.

The amended complaint alleges that in June, 1936, plaintiff recovered a judgment against the defendant Rudolph Spreckels and others for $923,031.91, on which an execution was returned wholly unsatisfied. It alleges on information and belief that the respondent Rudolph Spreckels transferred to his wife, the respondent Eleanor J. Spreckels, certain securities (3,267 shares of stock in 15 corporations are described in the complaint) or, alternatively, that he transferred to her the money with which she purchased them. Their value is alleged to exceed $250,000. It alleges that the transfer was without any valuable consideration and was made after respondent Spreckels had contracted the debt to the Bank of America (plaintiff's assignor) on which the money judgment was recovered and while he was insolvent. It also alleges that the transfer was made with the intent to hinder, delay and defraud his creditors and particularly the plaintiff. The prayer is that the transfer be declared fraudulent and void as against the plaintiff; that respondent Eleanor Spreckels account for the property transferred, and that it be applied in partial satisfaction of plaintiff's money judgment.

The court found that the judgment indebtedness was $923,031.91, and that the execution had been returned unsatisfied. But it also found that no transfer had been made of any securities or of any money with which Mrs. Spreckels is alleged to have bought them.

It might be remarked at this point that the appellant did not prove any such transfer of securities or of money wherewith they are alleged to have been purchased, and on this appeal no such claim is made. The case was tried and is now presented on an altogether different theory—one which departs from the plaintiff's pleading—namely, that respondent Spreckels, while insolvent, made an allowance to his wife of $2,500 for each of the first eleven months of 1930; that because of his insolvency such allowance was excessive, and that a substantial part of the $27,500, namely, all over and above a reasonable amount, should be applied on the appellant's money judgment.

The court found that for many years Mrs. Spreckels had received from her husband an allowance of $2,500 each month; that each of the eleven payments in question "was based on a substantial and valuable consideration", and that he at that time was not insolvent.

The appellant contends that the finding against insolvency is not supported by the evidence, and that the duty of support is not a consideration for the allowance by an insolvent husband to his wife of $27,500 in eleven months.

The trial lasted over a week and some 40-odd exhibits were introduced in evidence.

In 1928 Rudolph Spreckels had a net taxable income of $13,400,000, on which he owed a federal income tax of $2,007,484.99. In September, 1929, he borrowed from the Bank of America on his unsecured note $500,000, which was used to pay the third instalment of the tax. In January, 1930, he paid $50,000 on the note, and during 1930 several renewal notes for $450,000 were given, with security. Two corporations which he owned owed the bank a large sum of money, and in December, 1930, the entire indebtedness, including the unpaid $450,000, was consolidated into one note secured by real and personal property. Respondent Spreckels guaranteed the note, and the action which eventuated in the judgment for $923,031.91 was brought on that total indebtedness.

In 1927 the affairs of Kolster Radio Corporation, in which respondent Spreckels was the largest stockholder, took him to New York, where he remained until 1935. Mrs. Spreckels meanwhile remained in California, living in the family home in Hillsborough. Each year he made several visits home.

The size of respondent Spreckels' taxable income for the year 1928 indicates his large resources at that time. He always had been a wealthy man, having inherited about $4,000,000 from his parents, to which fortune he added greatly by his own efforts. He had been the largest stockholder, and president, of the First National Bank of San Francisco and later the owner of two-thirds of the stock, and president, of United Bank & Trust Company in the same city, which two-thirds interest he sold in 1927 for a little under $3,000,000. He testified that in 1920 his net worth was between $8,000,000 and $10,000,000.

Shortly after arriving in New York in 1927 he was drawn into the active management and control of the Federal Sugar Refining Company which was engaged in the refining and sale of sugar, with a refinery (the second largest in the United States) and an alcohol plant at Yonkers, New York. Between 1927 and 1929 he lent to that company $12,200,000, and in May, 1929, he effected its reorganization by incorporating the Spreckels Sugar Company, taking $12,200,000 of stock therein and wiping out the indebtedness in that amount. Spreckels Sugar Company owned 95% of the stock of Federal, and respondent Rudolph Spreckels owned, in June, 1930, practically all the stock of Spreckels Sugar Company, which took over the assets of Federal. Its plant—real estate, buildings, machinery, equipment and supplies—became the principal asset of Spreckels

Sugar Company, which continued to operate the Federal plant until it shut down in August, 1930.

In January, 1930, the New York banks notified respondent Spreckels that they would no longer finance the new company and as a consequence the buying of raw sugar to operate the refinery as a producing enterprise had to be suspended. Respondent Spreckels was engaged during all of 1930 and well into 1931 in repeated attempts to dispose of the refinery. He fixed its value originally at $11,000,000. Negotiations commencing early in 1930 were carried on for some months with United Molasses Company. Thereafter negotiations were carried on, lasting from July, 1930, to the spring of 1931, with General Foods Corporation which offered $7,000,000 for the physical properties. These were followed by negotiations with the Suchard interests which were on the basis of $7,000,000. The New York Central Railroad Company was a prospect for it was then considering a change in its right of way which would have taken in the refinery. Each of these negotiations, in turn, fell through. There was also an unsuccessful plan to combine the output of the Yonkers plant with that of several other refineries. This plan was not abandoned until 1932. Throughout 1930 respondent Spreckels kept the Bank of America in San Francisco informed of his activities by correspondence, which indicated that he was quite confident of a successful outcome. In his letter of July 31, 1930, he stated that the sale of the refinery, upon which he was then working, would enable him not only to liquidate all his outstanding obligations but would place him in a very strong cash position. At the trial he testified to the same effect, saying, "If I could have financed the Sugar Company my other problems would have been solved". On October 9, 1930, he wrote the bank that three prospective buyers were then seeking to acquire the refinery and that he was very confident that a satisfactory deal would be consummated shortly.

In 1932 after these efforts had failed, respondent Spreckels by his own action put the Spreckels Sugar Company into receivership. In 1935 the physical properties which he had originally held at $11,000,000, and for which General Foods had offered $7,000,000, were sold for $250,000 or less.

In January, 1930, the Kolster Radio Corporation went into receivership and was liquidated in February, 1931. Respondent Spreckels lost $2,700,000 on his Kolster investment.

In June, 1931, one of the Bank of America's correspondents in New York wrote that a bondholders' committee and another creditors' committee had been appointed in the Spreckels Sugar Company's affairs, and that three proposed deals had fallen through at the last minute.

In 1935 respondent Spreckels signed a confession of judgment in favor of his New York bank creditors in an amount not shown in the record.

Appellant's counsel read to respondent Spreckels from testimony he gave in the receivership proceedings in New York with respect to the situation in January, 1930, when he had been notified by the New York banks thtat they could no longer finance the Sugar Company. His answer was, "It made a hopeless situation as far as the company was concerned, and as far as I was concerned". From this answer the appellant argues that the respondent's insolvency in January, 1930, was admitted by himself. However, the respondent explained this by saying that while it rendered the Sugar Company's position hopeless, as far as financing it as an operating refinery was concerned, it did not render him personally hopeless, for he repeatedly testified that his net worth in January, 1930, was over $16,000,000 and that he had no obligations in default. A balance sheet prepared by Haskins & Sells, as of June, 1930, shows that Rudolph Spreckels' net worth, according to his books (admittedly kept on a cost basis), was $16,481,000. He testified further that the claimed worthlessness of the Sugar Company in January, 1930, could not have been shown by any one, and that in January, 1930, the book value of the Sugar Company's assets was in excess of $12-000,000. It also appears that in January, 1930, neither Rudolph Spreckels nor any of his companies was in default in the payment of interest. The record shows that he was never sued prior to 1934, was never in bankruptcy, and no petition in bankruptcy was ever filed against him.

The following facts, wholly uncontradicted, bear more directly upon the subject of support:

The respondents were married in 1895. Mrs. Spreckels had some means of her own and an inheritance later added to her separate estate. Shortly after the marriage respondent Spreckels made a gift to his wife of the family home on Pacific Avenue in San Francisco which she sold in 1924 for $90,000 or $95,000. In 1911 he made her a gift of $10,000 and in 1928 another of $50,000; on the eve of one of her European trips he gave her a letter of credit for $20,000.

In 1899 respondent Spreckels commenced giving his wife a monthly allowance for the running of their home, which practice continued uninterruptedly for 31 years. The first allowance was $1,000 a month. In 1901 this was increased to $1,200 a month; in 1903 to $1,500; in 1912 to $2,000, and in 1920 to $2,500 a month, at which figure it remained constant until and including November, 1930, when it was discontinued (according to respondent Spreckels' testimony) not because he did not have assets but because of his "cash situation". On the first of each month the Spreckels office issued a check to Mrs. Spreckels for $2,500 and deposited it in her checking account. This went on for over ten years with but trifling deviations. Her allowance was used to pay the servants and the ordinary running expenses of the home, such as supplies, food and clothing. Respondent Spreckels testified that the purpose of the allowance was so that his wife could maintain the home and herself and live in the way the wife of a rich man should live. "In other words, she had her charities, and her entertainment, and all of that she paid for". She testified that out of these allowances she managed to save something each month. Her husband out of other funds paid the chauffeurs, the automobile expenses, the wages of the watchman and gardener—all the "outside expenses"—also all taxes and all insurance premiums, including workmens' compensation.

After respondent Spreckels went to New York in 1927 he rented an apartment in the Ritz-Carleton Hotel and lived there for 4 or 5 years. He spent approximately $38,000 for his own furnishings in the apartment. He testified that his bill at the Ritz-Carleton averaged over $2,500 a month for a good many years, and that he entertained there "quite a bit".

During the eleven months in question the respondent Spreckels continued to be under heavy expenses. During the year 1930 his horse racing stable alone cost him $41,684.73 for upkeep, salaries and other expenses; in 1931, $38,091, and in 1932, $13,563.70. In 1932 and 1933 he disposed of his horses. During September, October and November, 1930, his hotel bills in New York were $2,194.10, $2,330.33 and $2,111.59 respectively. He contributed $500 a month to a California water power organization which he had fostered, and the same year donated $3,000 to the Community Chest.

He did not cut down his own living expenses until 1935. In other words, during the five years from January, 1930, when the New York banks withdrew the further financing of his enterprises, through that year and 1931 when he was negotiating with 3 or 4 large groups for the sale of the refinery, until the time when he finally had to put the Sugar Company in receivership, he spent just about as much on his own living expenses as he had spent during the earlier years (1928 for example) before the depression.

Respondent Spreckels testified that although the New York banks declined in January, 1930, to further finance the Sugar Company's operations he saw no need of reducing his living expenses, and that he did not believe he was in such financial condition as to require the reduction of his or his wife's living expenses. He testified further that when the eleven payments were made in 1930 he considered he could liquidate any obligation he might have.

In 1930 the respondents' children were of mature years and no longer lived with them. Mrs. Spreckels testified that in 1930 she was living extravagantly, but would not have done so had she known that her husband was somewhat financially embarrassed. She testified, further, that she always lived as people did who had a good deal of money, and after she purchased the Hillsborough home from her husband she continued to live in the same style as she had previously, and to maintain the same help around the place. When her allowance was stopped she believed it to be only temporary. She testified that her husband never discussed his business affairs with her; he testified to the same effect, and, further, that he never inquired into his wife's business affairs.

The respondent Spreckels had acquired the Hillsborough place in 1922. It was 20.65 acres in area. It was carried on the books at $182,508.29 for the land, improvements and furnishings. On June 17, 1930 Rudolph Spreckels, in whose name it stood, conveyed it by deed to Eleanor J. Spreckels for a cash consideration of $100,000. This transfer was attacked by this appellant. The trial court in that case held that there was a valuable consideration for the transfer. On appeal the judgment for the defendants was affirmed by this court. Raine v. Spreckels, 54 Cal.App.2d 169, 128 P.2d 709.

The respondent Spreckels also owned a summer home at Sobre Vista, in Sonoma County, consisting of about 1,800 acres which he acquired shortly after the respondents were married. It had a swimming pool, a tennis court and a half-mile race track on it. The respondent Spreckels' race horses were stabled there. The place cost him over $300,000, and was carried on his books at $252,176.28. In 1934 respondent Spreckels deeded this property to his sister-in-law in satisfaction of a debt to her of $100,000, which money he had borrowed in 1930.

The foregoing statement presents a fair resume of the financial situation of the respondent Spreckels during the eleven months in question and thereafter. From such resume his station in life (see Shebley v. Peters, 53 Cal.App. 288, 200 P. 364), may be deduced. It presents, also, a picture of the scale of living of both respondents during that time.

The appellant concedes that a wife is entitled to a reasonable allowance for her support, and that such allowance should be determined according to her husband's station in life. But the appellant argues that she is not entitled to anything beyond such reasonable allowance, and that any surplus over and above that "is a gift to her without the vestige of a consideration". The appellant concedes, in other words, that of the monthly allowance of $2,500 there was a valid and sufficient consideration up to a certain point, but he argues that beyond that there was none; that in 1930 respondent Spreckels' station in life had already changed.

At oral argument the question was put to appellant's counsel as to how the amount of the allowance should be determined and they promptly answered, by the court. Granting that this is so, the answer is that the trial court has determined it. It has spoken after hearing voluminous evidence respecting not only the husband's station in life but the wife's as well.

Whether or not there was a sufficient consideration in this case was an issue squarely joined by the pleadings. On that issue the court found, "that for many years prior to the month of January 1930, defendant Rudolph Spreckels had paid monthly to defendant Eleanor J. Spreckels, his wife, a monthly allowance of $2500. for her care, maintenance and support; that Rudolph Spreckels continued during the first eleven months of 1930 to make such monthly payments of $2500 * * *; that each of said monthly payments so made during the calendar year 1930 were in discharge of Mr. Spreckels' legal duty to care for, maintain and support his wife, * * * and each of said payments was accepted by her in discharge of such obligation; that each of said monthly payments * * * during the first eleven months of 1930, was based on a substantial and valuable consideration, and was not voluntary, and each was made by said defendant Rudolph Spreckels, and received by said defendant Eleanor J. Spreckels, without any intent on the part of either to hinder, delay or defraud the then existing or future creditors of defendant, Rudolph Spreckels, including plaintiff and plaintiff's assignor."

When the court found that the eleven monthly payments "were in discharge of Mr. Spreckels' legal duty to care for, maintain and support his wife" and were "based on a substantial and valuable consideration", it impliedly found, contrary to appellant's contention, that the *amount* of such payments, namely $2,500 a month, was commensurate with the husband's station in life and was a fit and proper allowance, and not excessive. If this judgment should be reversed, a new trial could accomplish no more than has been already accomplished. The trial court, in such event, would have to again make its decision on the facts which have been already passed upon. This court on appeal cannot say whether $2,500 was a proper allowance, or whether it should have been (as appellant contends) but $200 a month, or some amount in between those extremes. That was and is purely a question of fact related to the issue of consideration.

[1] Whether there is a sufficient consideration to support a contract is always a question of fact. Estate of Thomson, 165 Cal. 290, 296, 131 P. 1045.

[2] The trial court presumably directed its inquiry to the circumstances as they existed in 1930, for "The sufficiency of a purported consideration for a contract must be determined from the facts of the transaction as they existed when the contract was made rather than by subsequent developments." Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 165, 88 P.2d 698, 701, 89 P.2d 386, citing cases and 6 Cal.Jur. 167.

In passing upon this issue of fact the trial court had before it the voluminous testimony, already sketched, touching the resources, assets and general financial condition of respondent Spreckels during 1930, the testimony showing the history of the allowances, and the scale of living of both husband and wife during 1930. There was abundant testimony, therefore, as to the husband's station in life at the time in question.

Whether the respondent Spreckels' station in life had, or had not, changed during 1930 was a question of fact. The evidence already summarized as to his expenditures in New York for his own living during those eleven months and for several years beyond 1930 would seem to have some bearing on the size of the allowance to his wife. The evidence as to the heavy expenses respondent Spreckels was still carrying in 1930 (race horses $41,684.73, for example) was undoubtedly introduced for the purpose of showing that his station in life had *not* changed at that time. The evidence shows without contradiction that the negotiations with General Foods which was on a $7,000,000 basis lasted from July of 1930 into the spring of 1931. Other negotiations with Suchard and others followed thereafter. The receivership was not until 1932. Then there was a plan of reorganization whereby a very large sum was to have been borrowed from the Refinance Corporation. All this evidence had a bearing on the respondent Spreckels' station in life, and all of it was addressed, of course, to the trial court. It was upon all this evidence that the court based its findings of fact.

[3] "* * * In a case where the question of the sufficiency of the consideration for the contract rests wholly upon the construction of the evidence, which is conflicting, a verdict for the plaintiff will not be disturbed on appeal. * * *" 6 Cal.Jur. 168.

[4] In MacDermot v. Hayes, 175 Cal. 95, 104, 170 P. 616, 619, the court said: "The rule is too well settled to require citation of authority that, where the facts established may reasonably authorize opposite inferences and the trial court has adopted one and rejected the other, its decision is binding upon this court upon appeal; the case being in substance the same as that where it decides upon the weight of contradictory evidence." To the same effect are Parrino v. Rallis, 116 Cal.App. 364, 366, 2 P.2d 515 (a case dealing with sufficiency of consideration) and Fanning v. Green, 156 Cal. 279, 104 P. 308. See, also, Keating v. Morrissey, 6 Cal. App. 163, 168, 91 P. 677 and McCampbell v. Obear, 27 Cal.App. 97, 101, 148 P. 942, both dealing with sufficiency of consideration.

[5] In Parker v. Riddell, 41 Cal.App. 2d 908, 913, 108 P.2d 88, 91, a fraudulent conveyance case, the court says: "In considering an attack upon the findings, the test is 'not how we would find the facts to be', but whether there was substantial evidence strong enough to justify the conclusion reached. Still v. San Francisco, etc., Ry. Co., 154 Cal. 559, 98 P. 672, 20 L.R.A., N.S., 322, 129 Am.St.Rep. 177; Foster v. Foster, 8 Cal.2d 719, 68 P.2d 719. * * *."

Other cases, involving insolvency or fraudulent conveyances or both, and holding the same way, are First National Bank v. Ranger, 49 Cal.App. 447, 193 P. 788; Security, etc., Bank v. Bruder, 44 Cal.App. 2d 767, 771, 113 P.2d 3, and Kirkpatrick v. Towers, 60 Cal.App.2d 251, 254, 140 P.2d 681.

The appellant has culled from the evidence six items of expenditures made by Mrs. Spreckels during the eleven months in question which, it is claimed, were not for purposes contemplated by the allowance. These aggregate $11,603.33, and the appellant's position is that such amount should be held to respond to the appellant's money judgment. All these items were before the trial court, along with the numerous other questions to be weighed by the trier of the facts, and what has been said already respecting the findings of the trial court applies to these items as well.

During the trial counsel for appellant stated to the court that they had found no case dealing exactly with the situation. No such case has been cited on this appeal. The appellant relies chiefly on Trefethen et al. v. Lynam, 90 Me. 376, 38 A. 335, 38 L.R.A. 190, 60 Am.St.Rep. 271. In that case the husband, a sea captain, away from home most of the time, habitually sent his wife remittances of his earnings. These she intermingled with other money of hers used in the carrying on of a summer resort which she ran. He, on one occasion, contracted for the building of a structure on the resort premises, which stood in her name, and his creditor found nothing standing in *his* name upon which to levy. The court held that in such circumstances the property standing in the wife's name—the husband's earnings in large measure having been swallowed up in her venture—was answerable to the husband's creditors. Other cases cited by the appellant are no closer to the point. No case has been cited dealing with a stated monthly allowance.

[6, 7] In order for a creditor to prevail under section 3442, Civil Code as it read in 1930 there must be a concurrence of want of consideration *and* insolvency. 12 Cal.Jur. 1019, § 60; 1065, § 101; Security Trust Co. v. Silverman, 210 Cal. 578, 292 P. 636; Cain v. Richmond et al., 126 Cal.App. 254, 258, 14 P.2d 546; Enos v. Picacho Gold Mining Co., 56 Cal.App.2d 765, 776, 133 P.2d 663. The trial court has found as a fact, from evidence susceptible of opposite inferences, that there was sufficient consideration in this case. It is not necessary, therefore, for this court to pass upon appellant's other point—that the evidence is insufficient to support the finding that the respondent Spreckels was not insolvent in 1930.

The judgment is affirmed.

NOURSE, P. J., concurs.

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77 Cal.App.2d 26

GREGORY v. STATE.

Civ. 3445.

District Court of Appeal, Fourth District, California.

Nov. 25, 1946.

Hearing Denied Jan. 23, 1947.

1. Statutes 🔑226

Where State Gift Tax Act was modeled after Federal Gift Tax Act, and there were no decisions under state act to aid in solving question of construction, decisions interpreting Federal Act furnished a guide in construction of state act. St.1939, p. 2079 et seq.

2. Statutes 🔑226

Where legislation is patterned after a statute of another state or the federal government, which has been judicially construed, there is a very strong presumption of intent to adopt the construction as well as the language of the prior enactment.

3. Taxation ⟹105½

Where manager and owner of 40 per cent. of stock of family corporation transferred building to the corporation because income from building was not sufficient to meet obligations and leave manager with enough to pay his personal living expenses, there was a "gift" of the building within meaning of Gift Tax Act. St.1939, p. 2079 et seq.

4. Taxation ⟹105½

Where manager and owner of 40 per cent. of stock in family corporation gave a building to the corporation, there was an indirect gift to his four children and a nephew who owned 60 per cent. of the stock, and manager was entitled to an exclusion for each one of them in determining amount payable under Gift Tax Act. St.1939, p. 2079 et seq.

5. Taxation ⟹347

Where manager and owner of 40 per cent. of stock in family corporation gave a building to corporation, there could be no gift tax assessed on the proportion of value of building represented by 40 per cent. of stock in corporation. St.1939, p. 2079 et seq.

6. Taxation ⟹347

Where manager of family corporation, who owned 40 per cent. of the stock in corporation, owed notes totaling $318,147.81 secured by trust deed on building and other realty owned by corporation, and manager gave building to corporation under agreement whereby manager was to pay 40 per cent. of the total debt unpaid or $127,259.12, and the corporation the balance, the clear net value of the building was $112,740.88 at time of gift to corporation, for purpose of determining value of building for imposition of tax under Gift Tax Act. St.1939, p. 2079 et seq.

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Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by A. Gregory against the State of California to recover sum, plus interest, paid by plaintiff under protest as a gift tax assessed on conveyance by him of a building to family corporation. From a judgment for the plaintiff, the State appeals.

Judgment reversed with instructions to trial court to compute proper amount to be recovered by plaintiff together with interest.

James W. Hickey, Inheritance Tax Atty., and Raymond G. LaNoue, Deputy Inheritance Tax Atty., both of Sacramento, C. G. Kolts, Asst. Deputy Inheritance Tax Atty., of Los Angeles, and J. D. Lear, Asst. Deputy Inheritance Tax Atty., of Sacramento, for appellant.

Surr & Hellyer, of San Bernardino, for respondent.

MARKS, Justice.

This is an appeal from a judgment whereby plaintiff recovered $11,295.41, together with interest from November 11, 1943. The principal sum was paid under protest as a gift tax assessed on the conveyance, by him to the Redlands Security Company on December 31, 1942, of the Platt Building in San Bernardino, California. The facts are not in dispute. We will hereafter refer to the Redlands Security Company as the corporation.

The corporation was a family company, plaintiff owning forty per cent of its stock and his four children and a nephew, who evidently was considered a member of his family, owning sixty per cent in various amounts. The corporation had a net worth of at least $750,000. Plaintiff had been its manager for many years and testified that he operated it about as he pleased. During the years 1937, 1938 and 1939 he received an annual salary of $1200. He received no salary during the next three years. It was proposed to pay him a salary of $500 per month after the transfer of the Platt Building, but wages and salaries were frozen in October, 1942, by executive order and he was permitted to receive $250 per month by the federal agency.

Plaintiff has explained in considerable detail the reasons which prompted his transfer of the property. The income from the Platt Building had decreased because the younger tenants had vacated their offices to enter the Armed Forces of the United States. The remaining income was not sufficient to permit plaintiff to meet his usual obligations, both legal and charitable, with enough left to pay his personal living expenses. He made the transfer to shift some of those obligations, both legal and charitable, to the corporation and to acquire sufficient income to support himself.

The trial judge based his judgment for plaintiff on the following findings of fact:

"II. The transfer of the Platt Building by plaintiff to Redlands Security Company (hereinafter called 'Company') referred to in the pleadings was made without donative intent. Said Company was not a donee and plaintiff made no gift to said Company or to anyone in such transfer.

"III. The market value of the property transferred by plaintiff to said Company was at the time of transfer the sum of $15,000.

"IV. No gift tax was or is payable to the State of California upon or in receipt of such transfer."

The California Gift Tax Act of 1939 (Stats.1939, p. 2079, now codified into sections 15101 to 16652, inclusive, of the Revenue and Taxation Code) places a tax on direct or indirect gifts made with donative intent to a "person" which word is defined to include "any person, firm, partnership, association, corporation, company, syndicate, estate, trust, business trust, or organization of any kind." See sections 4, 5, 6, 10, 13 and 36 of the Act.

[1, 2] We are cited to no California decisions on the questions here presented, construing the Gift Tax Act of 1939. In Douglas v. State of California, 48 Cal.App. 2d 835, 120 P.2d 927, 929, the following well established rule of construction is stated:

"In important particulars our state act is modeled after the federal gift tax, first enacted in 1924, repealed as of January 1, 1926, and enacted again in 1932. 1924: 26 U.S.C.A. Int.Rev.Acts, 1924 to date, p. 79, §§ 319–324; 1932: 26 U.S.C.A. Int.Rev. Acts, 1924 to date, p. 580, §§ 501-532. There are no decisions under the state act to aid in solving the problem presented by this case. However, in view of the fact that material provisions of the federal statute and state act are substantially identical, decisions interpreting the federal law furnish a guide in construction of the state act. Where legislation is patterned after a statute of another state or the federal government which has been judicially construed there is a very strong presumption of intent to adopt the construction as well as the language of the prior enactment. Union Oil Associates v. Johnson, 2 Cal.2d 727, 735, 43 P.2d 291, 98 A.L.R. 1499; Holmes v. McColgan, 17 Cal.2d 426, 430, 110 P.2d 428." We will, therefore, have to turn to federal court decisions to aid us in the solution of the problems before us.

The finding of the trial court to the effect that the transfer to the corporation was made without donative intent is challenged by defendant as contrary to both the evidence and the law. It is pointed out that in paragraph 5 of the complaint it is alleged that as far as plaintiff and his family is concerned the conveyance was made for their benefit and with donative intent as to each member of the family. This is not directly denied in the answer. However, it is alleged that the gift was made to the corporation with donative intent as to it. Further, plaintiff testified that he would not have made the conveyance if the stock in the corporation had not been owned by himself and the members of his family.

The question of whether or not there was a gift of the property with donative intent divides itself into several parts. First, was there a gift at all from which the donative intent must be presumed? Second, if there was such a gift, was the donee the corporation or were all or a part of the stockholders the donees? Third, if there was a donative intent to confer economic benefits on all or part of the stockholders of the corporation so that there was an intention to confer an indirect benefit upon them, can plaintiff be considered as a donee to the extent of forty per cent of the property conveyed, representing his ownership of forty per cent of the corporate stock?

In 24 American Jurisprudence, p. 730, we find the following:

"A gift has been judicially defined as a voluntary transfer of property by one to another without any consideration or compensation therefor. It has sometimes been defined by statute as a transfer of personal property made voluntarily and without consideration, and also, generally, as that which is given, anything given or bestowed, or any piece of property voluntarily transferred by one person to another. Hence, it is apparently well established at law that to constitute a valid gift a transfer must be voluntary, absolute, and without consideration."

[3] The evidence indicates that the conveyance of the Platt Building had the three attributes necessary to constitute a gift. There is nothing in the record to indicate any legal compulsion on plaintiff to make the conveyance so it must be regarded as voluntary. It was also absolute as there is nothing to indicate the reservation of any interest in the grantor, disregarding for the moment any consideration of his ownership of forty per cent of the corporate stock. It was also without consideration as it is clear that the salary of $500 per month which plaintiff hoped to receive from the corporation was to be paid him as compensation for his services as manager and not as consideration for the conveyance of the property. As the transaction possessed all the characteristics of a gift the inference necessarily follows, in the absence of any showing to the contrary, that the conveyance was a gift made with donative intent.

The question of who was the donee or donees of the gift presents more difficulty and finds its answer by analogy in cases involving gifts to trusts which have been before the Board of Tax Appeals and the Federal Courts.

Prior to the decision of the case of Helvering v. Hutchings, 312 U.S. 393, 61 S.Ct. 653, 85 L.Ed. 909, the Board of Tax Appeals had held rather consistently that where a trustor created an irrevocable, present trust (as distinguished from one conveying a future interest), not subject to modification, the corpus of the trust conveyed to the trustee constituted a present gift to the trust subject to a single tax exemption or exclusion. This was on the theory that the statute defined a person (donee) as including a trust; that a trust was a legal entity well recognized in the law; that as the trust took legal title to the property there was a direct gift to it subject to but one exclusion. See, Hutchings v. Commissioner, 40 B.T.A. 27; Thompson v. Commissioner, 42 B.T.A. 121.

In Rubinstein v. Commissioner, 41 B.T.A. 220, the Board of Tax Appeals was confronted with not less than three decisions of Circuit Courts of Appeals holding that where a trustor conveyed property to a trustee creating a present vested estate in the corpus without any power to revoke or modify the trust, there was an indirect benefit conferred on the beneficiaries and that the gift was to them; that the tax was to be computed on the value of the indirect gift to each beneficiary and that the donor was entitled to his exclusion for each beneficiary. The Board of Tax Appeals merely reversed its former policy and followed the decisions of the Circuit Courts of Appeals in deciding the Rubinstein case.

The history of the case of Thompson v. Commissioner, 42 B.T.A. 121, and Thompson's appeal, B.T.A. memo opinion, C.C.H. Dec. 11, 767A, are interesting and informative. Thompson organized a Kentucky corporation in 1932 and transferred to it property of the value of $33,578.52 in exchange for one hundred shares of its capital stock, fifty shares of which were subsequently transferred so that he was the owner of fifty shares individually and of forty shares as trustee for his four children and his wife was the owner of ten shares. He made other gifts to the corporation. In his gift tax return Thompson claimed no tax due on one-half of the gifts represented by his fifty per cent of the capital stock of the corporation and claimed exclusions for the shares owned by the other members of his family. These cases were decided by the Board of Tax Appeals prior to the decision of Helvering v. Hutchings, supra, by the Supreme Court of the United States and the Board of Tax Appeals held that the gifts were to the corporation and not to the stockholders and assessed gift taxes in the sum of $23,235.25. Thompson appealed both cases to the United States Circuit Court of Appeals, Sixth Circuit. A few months after the decision in Helvering v. Hutchings, supra, the Circuit Court of Appeals on stipulation of counsel ordered both judgments of the Board of Tax Appeals reversed with instructions to reduce the judgments by sums totaling $17,888.03. Thompson v. Commissioner, 6 T.C. 285. While exact computation of the tax is impossible from the information available here, it seems evident that Thompson's contention that one-half of the gifts were tax free because made to himself as owner of one-half of the corporate stock and that certain of the exclusions claimed by him were allowable must have been sustained.

The case of Scanlon v. Commissioner, 42 B.T.A. 997, is also informative. Scanlon organized a corporation and became the sole stockholder except for five qualifying shares issued to the directors. He transferred to the corporation stock of considerable value in other corporations. On dissolution all assets were distributed to him. The directors had surrendered their qualifying shares and received nothing. The Board of Tax Appeals held no gift tax was due because there was no true gift within the meaning of the gift tax law as Scanlon's "interest as sole stockholder in the corporation's property gave him a corresponding compensation for the transfer."

The courts in construing acts of Congress frequently have recourse to the reports of committees proposing the legislation. These reports are considered valuable in determining the intent of the legislators in passing the laws.

The report of the Ways and Means Committee of the House contains the following comment on certain of the Gift Tax provisions of the Revenue Act of 1932, 26 U.S.C.A. Int.Rev.Acts, page 580 et seq.:

"The words 'transfer * * * by gift' and 'whether * * * *direct or indirect*' are designed to cover and comprehend all transactions (subject to certain express conditions and limitations) whereby and to the extent (Sec. 503) that property or a property right is *donatively passed* to or conferred upon another, regardless of the means or device employed in its accomplishment. For example, (1) a transfer of property by a corporation without a consideration, or one less than adequate and full in money or money's worth to B, would constitute a gift from the stockholders of the corporation to B; (2) *a transfer by A to a corporation owned by his children would constitute a gift to the children;* (3) a transfer of property to B where there is imposed upon B the obligation of paying a commensurate annuity to C, would be a gift to C." (Emphasis ours.)

The Supreme Court of the United States in the case of Burnet v. Guggenheim, 288 U.S. 280, 53 S.Ct. 369, 370, 77 L.Ed. 748, had under consideration certain gift tax provisions of the Revenue Act of 1924, 26 U.S.C.A. Int.Rev.Acts, page 79 et seq. The taxpayer in 1917 had created two revocable trusts, one for the benefit of his son and one for the benefit of his daughter. In 1925 the taxpayer surrendered his power of revocation thus creating a present vested estate in the beneficiaries in the corpus of the trust. The Supreme Court held that the surrender of the power of revocation constituted a gift to the beneficiaries. In discussing the problem the court said:

"'Taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed —the actual benefit for which the tax is paid.' * * * The statute is not aimed at every transfer of the legal title without consideration. Such a transfer there would be if the trustees were to hold for the use of the grantor. It is aimed at transfers of the title that have the quality of a gift, and a gift is not consummate until put beyond recall. * * * The tax on gifts was something new. Even so, the concept of a transfer, so painfully developed in respect of taxes on estates, was not flung aside and scouted in laying this new burden upon transfers during life. Congress was aware that what was of the essence of a transfer had come to be identified more nearly with a change of economic benefits than with technicalities of title."

In Welch v. Davidson, 1 Cir., 102 F.2d 100, 102, it appears that in 1934 Davidson created an irrevocable trust in favor of his six daughters. During the same year he gave a home worth $20,000 to one of the daughters. In making his gift tax return Davidson claimed $35,000 in exclusions, being $5000 for each daughter beneficiary under the trust and $5000 on the gift of the home. The Circuit Court of Appeals allowed a $5000 exclusion for each daughter, beneficiary under the trust, saying:

"The statute of 1932, like that of 1924, was 'not aimed at every transfer of the legal title without consideration.' It was aimed at transfers that 'had come to be identified more nearly with a change of economic benefits than with technicalities of title', at 'transfers of the title that have the quality of a gift.' Surely transfer of title to the trustee did not partake of the quality of a gift. The trustee was not the object of the plaintiff's bounty. The transfer to it of the bare legal title effected 'no change of economic benefits' in its behalf. The beneficiaries are the donees."

Rheinstrom v. Commissioner, 8 Cir., 105 F.2d 642, 124 A.L.R. 861, is also a trust case and quotes from and follows Welch v. Davidson, supra, in holding that the gift was to the children of the trustor who were named beneficiaries and not the trustee. Consequently an exclusion was allowable for each beneficiary. The trustor also reserved to herself a life estate in forty per cent of the trust. Both the Board of Tax Appeals (37 B.T.A. 308 at page 312), and the Circuit Court of Appeals agreed that no tax should be levied on this reserved life estate because it was not a gift as the trustor and the beneficiary of this portion of the trust fund was one and the same person. Clearly there was no change in the economic benefits in this portion of the trust funds.

Hutchings v. Commissioner, 5 Cir., 111 F.2d 229, 230, was also a case involving a trust created by the trustor for the benefit of her seven children. The question presented was whether one or seven exclusions were allowable. The Circuit Court of Appeals held that seven exclusions were allowable, as the gifts were to the children and not to the trust. In discussing the question it was said:

"Petitioner is in the extremely fortunate position of being able to point out that every Circuit Court of Appeals and every District Court which has passed on the question, has held that the objects of the donative intent in such cases and therefore the recipients of the gifts, are the beneficiaries, not the trustees, who are the mere instruments for carrying out the intent, and that the Board itself has in later cases, taken the same view."

The same case was reviewed by the Supreme Court of the United States. Helvering v. Hutchings, supra. In holding that the gift was to each beneficiary under the trust and not to the trust and that an exclusion should be allowed for each beneficiary, it was said [312 U.S. 393, 61 S.Ct. 654]:

"The gift tax provisions are not concerned with mere transfers of legal title to the trustee without surrender by the donor of the economic benefits of ownership and his control over them. A gift to a trustee reserving to the donor the economic benefit of the trust or the power of its disposition, involves no taxable gift. It is only upon the surrender by the donor of the benefit or power reserved to himself that a taxable gift occurs. Sanford's Estate v. Commissioner, 308 U.S. 39, 60 S.Ct. 51, 84 L.Ed. 20; Rasquin v. Humphreys, 308 U.S. 54, 60 S.Ct. 60, 84 L.Ed. 77, and it would seem to follow that the beneficiary of the trust to whose benefit the surrender inures, whether made at the time the trust is created or later, is the 'person' or 'individual' to whom the gift is made. * * *

"The reports of the committees of Congress used words in their natural sense and in the sense in which we must take it they were intended to be used in § 504(b) when, in discussing § 501, they spoke of the beneficiary of a gift upon trust as the person to whom the gift is made."

The foregoing decisions deal largely with trusts which are legal entities and which hold the legal title to properties for the benefit of the beneficiaries who are the equitable owners. A corporation is also a legal entity with many attributes differing materially from those of trust. We must, therefore, determine whether or not the principles announced in the cases involving trusts are applicable here where the grantee of the property was a corporation. Before reviewing the California authorities on this question we should again advert to the report of the House Ways and Mean Committee where it is clearly stated that a gift by a donor "to a corporation owned by his children would constitute a gift to the children."

In MacDermot v. Hayes, 175 Cal. 95, at page 114, 170 P. 616, at page 623, it is said:

"A corporation is created and given a legal existence in order that it may, in its legal capacity, hold and manage the property transferred and business committed to it by its stockholders. They are the beneficial owners of the corporate property. The corporation is their agency and holds the property for their benefit and in trust for them. The interest of each stockholder in the property is the proportion which his shares of stock bear to all the stock outstanding. The certificates are not property in the real sense, but are merely evidences of the undivided interests of the several stockholders in the corporate assets and business."

In Atkins v. Gamble, 42 Cal. 86, 10 Am. Rep. 282, it was held that the stockholders of a corporation are joint owners of the franchise and property of the corporation and that the stock certificates furnish evidence of the quantum of interest held by each stockholder. See also, San Diego v. San Diego, etc., Co., 44 Cal. 106.

In People ex rel. Burke v. Badlam, 57 Cal. 594, the court said:

"This property is held by the corporation in trust for the stockholders, who are the beneficial owners of it in certain proportions called shares, and which are usually evidenced by certificates of stock. The share of each stockholder is undoubtedly property, but it is an interest in the very property held by the corporation." Estate of Duffill, 180 Cal. 748, 183 P. 337, and Newell-Murdoch Realty Co. v. Wickham, 183 Cal. 39, 190 P. 359, are to the same effect.

In W. F. Boardman Co. v. Petch, 186 Cal. 476, 199 P. 1047, 1050, it is said:

"A corporation is the creature of its stockholders and it holds its property in trust for them. As between themselves and the corporation, the stockholders are the beneficial owners of the property held by the corporation. Havemeyer v. Superior Court, 84 Cal. [327], 362, 24 P. 121, 10 L.R.A. 627, 18 Am.St.Rep. 192; Ashton v. Dashaway Ass'n, 84 Cal. [61], 65, 22 P. 660, 23 P. 1091, 7 L.R.A. 809; Hobbs v. Tom Reed, etc., Co., 164 Cal. [497], 499, 501, 129 P. 781, 43 L.R.A.,N.S., 1112; Rossi v. Caire, 174 Cal. 74, 81, 161 P. 1161."

[4] We conclude from the foregoing authorities that there is sufficient similarity between the equitable interest of a stockholder in the property of a California corporation and the equitable interest of a beneficiary in the corpus of a trust to make the decisions of the Supreme Court of the United States and the Circuit Courts of Appeals in trust cases applicable to the facts of the instant case. Therefore, under those rules which seem to be thoroughly established we are of the opinion that there was an indirect gift to the members of plaintiff's family, including his nephew, who were stockholders and that he was entitled to an exclusion for each one of them.

[5] The situation of plaintiff as owner of forty per cent of the stock of the corporation presents an additional question. If we follow the economic benefit theory announced by the Federal courts there was no taxable gift involved in so far as forty per cent of the value of the Platt Building is concerned as no economic benefit was transferred when the gift was made. There was only a change in the form of the title. Plaintiff was the owner of the entire estate and he became the equitable owner of forty per cent of it. See, Rheinstrom v. Commissioner, supra; Helvering v. Hutchings, supra. Scanlon v. Commissioner, 42 B.T.A.. 997, is direct authority for the conclusion that there could be no tax assessed on the proportion of the value of the Platt Building represented by the forty per cent of stock in the corporation owned by plaintiff. No tax should be collected on this portion of the value of the property conveyed to the corporation.

The parties disagree as to the net value of the Platt Building at the time of the conveyance. They agree that the building had a value of $240,000 but cannot agree on the amount to be deducted because of an incumbrance.

In 1938 plaintiff and his wife (now deceased) and the corporation executed a joint and several note in the principal sum of $375,000 secured by a deed of trust on the Platt Building and several parcels of property owned by the corporation. Instalments had been paid on the principal so that on December 31, 1942, there remained $318,147.81 unpaid. The deed of trust contained a release clause so that the Platt Building could be released from the lien of the deed of trust upon payment of $225,000. The trial court found the net value of the Platt Building at the time of the conveyance to be $15,000 by deducting the amount necessary to release it from the lien, $225,000 from $240,000, the admitted gross value of the property. The difficulty presented in this phase of the case arises from an agreement between plaintiff and the corporation whereby the plaintiff agreed to pay forty per cent of the total debt unpaid on December 31, 1942, or $127,259.12, and the corporation the balance.

Defendant argues that only the amount which plaintiff was required to pay to satisfy the debt should be deducted from the value of the property leaving a value of $112,740.88, actually conveyed. Plaintiff seeks to support the finding that the net value conveyed was only $15,000.

A somewhat similar situation was involved under the California Inheritance Tax Act in Estate of Parrott, 199 Cal. 107, 248 P. 248. Deceased and her brother, Joseph A. Donohoe, owned a building in San Francisco worth $1,000,000, on which there was a mortgage lien of $260,000 at the time of her death. Donohoe was at all times solvent and paid his half of the debt after the death of his sister. The question decided was the amount of the deduction to be taken from half the value of the building in fixing the inheritance tax. The Supreme Court held that only $130,000 should be deducted as it was the actual portion of the debt owed by the deceased, her brother being solvent and having paid his portion of the debt after her death. Thus it is the actual and not the potential liability that should fix the amount of the deduction.

The same rule should be applied here and only the amount that plaintiff would be obligated to pay to satisfy his portion of the debt should be deducted from the value of the building, he having the right of contribution from a very solvent corporation for any additional amount he might pay.

[6] To sum up, we have reached the following conclusions: That the clear net value of the Platt Building was $112,740.88 at the time of its conveyance to the corporation; that there was no taxable gift from plaintiff to himself of forty per cent of this value represented by his ownership of forty per cent of the stock of the corporation because as to this forty per cent the conveyance represented merely a change of the legal title and not a change of the economic benefits; that the conveyance of sixty per cent of the clear value of the Platt Building constituted an indirect gift with donative intent to each of the other stockholders of the corporation in the proportion that the stock owned by each bore to the total issued stock of the corporation; that plaintiff is entitled to a lawful exclusion on each gift to each of such donees.

The trial court allowed plaintiff interest on the full amount of the gift tax paid by him from the date of the payment. Defendant urges this as error as a gift of state funds, citing Molineux v. California, 109 Cal. 378, 42 P. 34, 50 Am.St.Rep. 49, and Estate of Stanford, 126 Cal. 112, 54 P. 259, 58 P. 462, 45 L.R.A. 788.

As originally passed the Gift Tax Act of 1939 contained no provision for interest on the recovery of any overpayment. Section 74 of the Act was amended (Stats. 1945, P. 838) allowing interest on overpayments at the rate of six per cent per annum.

Counsel for plaintiff state in their brief that because it had to be filed promptly after its completion its author did not have sufficient time to properly investigate the question of interest. They, therefore, offered to remit all interest accruing prior to May 18, 1945, the effective date of the amendment. As the case must be referred back to the trial court for determination of the proper amount of the overpayment to be recovered by plaintiff, the determination of the question of interest can be deferred to that time.

The judgment is reversed with instructions to the trial court to compute the proper amount to be recovered by plaintiff, together with interest, if any interest is recoverable, in accordance with the views herein expressed and then to enter judgment for plaintiff for the amount so determined. Neither party will recover costs of appeal.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

77 Cal.App.2d 170

AVERETT v. CARRIGUE.

Civ. 15364.

District Court of Appeal, Second District, Division 1, California.

Dec. 5, 1946.

1. Evidence 🔑**455**

Whether parol evidence was admissible to show what parties to release understood it to mean and refer to depended upon whether language of release was so uncertain and indefinite as to necessitate resort to extrinsic evidence respecting the circumstances surrounding execution of instrument, situation of the parties, and their intention in executing it. Civ. Code, §§ 1636, 1638.

2. Evidence 🔑**441(1), 442(1)**

Where parties embody the complete terms of an agreement in a writing, such integration becomes as a matter of law the agreement of the parties, and, under the parol evidence rule, extrinsic evidence is inadmissible to prove what such agreement is; prior and contemporaneous negotiations, oral or written, being superseded by the writing. Civ.Code, §§ 1636, 1638.

3. Evidence 🔑**450(12)**
Release 🔑**31**

Agreement by which general manager of business released all claims against owner, referring particularly to any claims as to such business without, however, limiting generality of release, was unambiguous and sufficient to constitute a release of note given general manager as part consideration for his interest in another business in which the parties had been partners, and parol evidence was inadmissible to show that release related only to the business mentioned therein and did not cover such note. Civ.Code, §§ 1636, 1648.

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action on a promissory note by C. P. Averett against H. J. Carrigue, also known as Henry J. Carrigue, and also as doing business under the fictitious firm names of Waterwell Equipment Company and as Miracle Farms Company. Judgment for defendant, and plaintiff appeals.

Judgment affirmed.

Saul S. Klein, of Los Angeles, for appellant.

Lawrence Paul Scherb, of Culver City, for respondent.

YORK, Presiding Justice.

By the instant action, plaintiff seeks to recover from defendant the sum of $2,750, evidenced by a promissory note dated December 31, 1944, plus attorney's fees and costs. As a defense to said action, defendant pleaded an agreement and release dated March 6, 1945, which, it is alleged, "released and discharged this answering defendant from the claim herein sued upon." The trial court found in favor of such defense and ordered judgment for defendant. This appeal is prosecuted therefrom on the ground that "the trial court erred in not permitting the plaintiff to offer evidence as to what the parties themselves understood the agreement and release to mean and refer to."

The record discloses that on December 31, 1944, appellant Averett was general manager of Water Well Equipment Company which was owned by respondent Garrigue; that said parties were also partners in a venture called Miracle Farms Company, which they dissolved as of December 31, 1944, by formal agreement dated January 26, 1945; that pursuant to such dissolution agreement appellant retired from the partnership and as consideration for his interest received respondent's note for $2,750 (sued for in this action) together with a deed to certain property upon the agreement that appellant should pay the balance due on the purchase price thereof and all escrow expenses, which deed was dated and acknowledged on March 29, 1945. Thereafter, on March 6, 1945, appellant, as general manager, and respondent, as owner, of the Water Well Equipment Company, and their respective wives, executed an Agreement and Release wherein and whereby the Averetts discharged and released "from any and all claims of every kind and nature whatsoever that they or either of them may have against Henry J. Garrigue and Marie Therese de la Garrigue, his wife, whether known or unknown from all time past until the present time and particularly, but without limiting the generality of the above and foregoing provisions, any claims to the Water Well Equipment Company. Said C. P. Averett and Mary Margaret Averett, his wife, hereby assign, set over and transfer to the said Henry J. Garrigue and Marie Therese de la Garrigue, his wife, any and all interest of any kind and nature that they may have in the Water Well Equipment Company, or any of its assets.

"In consideration of the above and foregoing, Henry J. Garrigue and Marie Theresa de la Garrigue, his wife, do hereby agree to pay to C. P. Averett and Mary Margaret Averett, his wife, the sum of Eleven Thousand ($11,000.00) Dollars, payable as follows: * * *."

It was contended in the trial court, as it is here, that the parties to the instant cause were participants in two separate and different transactions: (1) The dissolution and settlement of the Miracle Farms Company partnership, out of which the note here involved arose; (2) the settlement with reference to the Water Well Equipment Company, in connection with which the agreement and release was executed.

Under this theory, appellant sought in the trial court to introduce evidence for the purpose of showing that the release agreement "is a release for just the Water Well Equipment Company, and is not a release for the note" which was given as part consideration for the dissolution of the partnership.

[1] The question presented for determination, as stated in Universal Sales Corp. v. California Press Mfg. Co., 20 Cal. 2d 751, 760, 128 P.2d 665, 671, is: "Whether or not the language of the contract is sufficiently certain and definite to render unnecessary a resort to extraneous evidence respecting the circumstances surrounding the execution of the instrument, the situation of the parties, and their intention in executing it."

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Sec. 1636, Civil Code. "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Sec. 1638, Civil Code.

[2] In Estate of Gaines, 15 Cal.2d 255, 264, 100 P.2d 1055, 1060, the court, in discussing the parol evidence rule, stated: "The rule as applied to contracts is simply that as a matter of substantive law, a certain act, the act of embodying the complete terms of an agreement in a writing (the 'integration'), *becomes the contract of the parties.* The point then is, not how the agreement is to be proved, because as a matter of law the writing is the agreement. Extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself. The rule comes into operation when there is a single and final memorial of the understanding of the parties. When that takes place, prior and contemporaneous ne-

gotiations, oral or written, are excluded; or, as it is sometimes said, the written memorial supersedes these prior or contemporaneous negotiations." (Emphasis included.)

[3] The agreement here in question is without ambiguity and clearly recites that appellant and his wife "do hereby release and discharge" respondent and his wife "from any and all claims of every kind and nature whatsoever that they or either of them may have against" respondent and his wife, *"whether known or unknown from all time past until the present time and particularly, but without limiting the generality of the above and foregoing provisions, any claim to the Water Well Equipment Company."*

The language of the document is amply sufficient to constitute a release of the note here sued upon. It should not be overlooked that appellant at no time contended that the release agreement was invalid because of fraud, mistake or for any other reason. As a result, the ruling of the trial court excluding the introduction of parol evidence to explain the terms of the document in question, was without error.

For the reasons stated, the judgment is affirmed.

DORAN, J., concurs.

WHITE, Justice (concurring).

I concur. While explanation of a contract by reference to the circumstances under which it was made and the matter to which it relates is authorized by section 1647 of the Civil Code, such evidence is never admissible in connection with a written contract to add or take away anything from the agreement. This rule of evidence is applicable only in cases where upon the face of the contract itself there is doubt, "To dispel that doubt, not by showing that the parties meant something other than what they said, but by showing what they meant by what they said." United Iron Works v. Outer Harbor Dock & Wharf Co., 168 Cal. 81, 84, 85, 141 P. 917, 920. Were the proffered evidence offered in the instant case received, its effect would be to put a different sense and construction upon the language of the contract from that which it would naturally bear, and not to show the circumstances under which the language was used. The language of the contract here in question was clear and understandable, and there was no need for interpretation by way of "surrounding circumstances" in connection with its execution. The evidence offered was therefore properly excluded. Boat & Barge Corp. v. Beverly Finance Co., 71 Cal.App.2d 800, 810, 163 P.2d 913.

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77 Cal.App.2d 142

PEOPLE v. PORTER.

Cr. 2417.

District Court of Appeal, First District, Division 2, California.

Dec. 4, 1946.

1. **Burglary** 🔑41(1)

Evidence sustained conviction of burglary of the first degree.

2. **Sodomy** 🔑6

Evidence sustained conviction for sexual perversion. Pen.Code, § 288a.

3. **Criminal law** 🔑775(3)

Instruction that defendant should be acquitted if defendant's alibi evidence left jury with a reasonable doubt of defendant's guilt was proper.

◆

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Dillard E. Porter was convicted of burglary of the first degree and a violation of section 288a of the Penal Code, and he appeals.

Judgments affirmed.

Leo A. Sullivan and Everett E. Power, both of Oakland, for appellant in pro. per. Dillard E. Porter.

Robert W. Kenny, Atty. Gen., and Edward F. Dullea, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was convicted by a jury of two felonies, burglary of the first degree and a violation of section 288a of the Penal Code, and the jury further found two prior convictions of felonies as charged in the information. After the opening brief was filed appellant by letter discharged his attorney and on October 28, 1946, appellant filed a verified document with this court alleging various claimed acts of misconduct upon the part of his attorney by reason of which he alleged that he was prejudiced in the trial court and on his appeal. He was notified by letter mailed the same day that if he desired to file an additional opening brief he should forward a letter to the clerk asking for time to do so. No reply has been received to this letter, and for that reason we now feel justified in acting upon his appeal, which had been placed upon our November calendar before October 28, 1946, and was ordered submitted on November 12.

The complaining witness, Mrs. G., was staying at a friend's house in Berkeley on the night of October 23, 1945. She was sleeping on a davenport in the living room and was alone in the house. About 3 a.m. she was awakened and saw a man in the room clad only in a dark colored turtleneck sweater which extended somewhat below his waist. The man spoke to her and suggested that she let him commit the act upon her person denounced by Penal Code sec. 288a. She resisted but after a struggle he accomplished his purpose. He then went into the bathroom and Mrs. G. fled to a neighbor's house and notified the police. While she was standing on the neighbor's porch she saw her assailant leave the house, still clad only in the sweater. $52 was found missing from Mrs. G.'s purse.

Later that morning the police arrested the appellant. He denied his guilt and said that he had spent the whole night at an all night show in Oakland. A turtle-neck sweater was found in the trunk of appellant's automobile which Mrs. G. identified as similar to the one worn by her assailant. A peculiarly shaped knife was found in appellant's home which Mrs. G. testified looked like a knife carried by her assailant. At the police station she heard appellant speak before she had seen him there and identified his voice as that of her assailant. She positively identified appellant at the trial but it was shown that at the preliminary hearing her identification had been less positive and the assault upon her was committed in a dark room lighted only by a flashlight carried by the intruder.

A sweater worn by Mrs. G. over her night dress, her bedclothes, appellant's sweater, the knife, a portion of a window sill from the house in which Mrs. G. was assaulted with a depressed mark on it, scrapings from Mrs. G.'s finger nails, samples of her hair, a piece of dark fuzz which Mrs. G. combed from her head the day following the assault and a comb taken from appellant were all delivered to Dr. Kirk, a professor of biochemistry and advisor in criminology. Dr. Kirk testified that he found on appellant's sweater hairs similar to those of Mrs. G. and wool fibers identical in texture and colors to those found in the bedclothes and in Mrs. G.'s sweater; he found on the bedclothes and Mrs. G.'s sweater hairs similar to those taken from appellant's comb and wool fibers similar in texture and color to the wool of appellant's sweater; he found on both sweaters identical red cloth fibers not found in any object submitted to him; he found in Mrs. G.'s finger nail scrapings wool fibers that matched the wool in appellant's sweater and the tuft combed from Mrs. G.'s head also matched appellant's sweater. He also determined by tests that the mark in the window sill was made with the knife found in appellant's home.

Appellant and several witnesses testified that he was playing cards at the home of friends on the night in question and was constantly with them until a time later than the time when the crimes were committed.

[1-3] The above recital establishes that the judgments of conviction, although based largely on circumstantial evidence, find support in the evidence. Because of appellant's claim that his attorney was not

properly representing him we have very carefully examined the transcript and find no support therein for appellant's charge of misconduct or neglect. The trial was fairly conducted and the jury was properly instructed. We note that the proper charge was given on the effect to be given circumstantial evidence by the jury as required by People v. Bender, 27 Cal.2d 164, 163 P.2d 8, and that the jury was also properly instructed on alibi evidence that if it left the jury with a reasonable doubt of defendant's guilt they should acquit him. People v. Costello, 21 Cal.2d 760, 135 P.2d 164.

The judgments appealed from are affirmed.

NOURSE, P. J., and GOODELL, J., concur.

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77 Cal.App.2d 134

LEATHERS v. LEATHERS.

Civ. 7224.

District Court of Appeal, Third District, California.

Dec. 3, 1946.

1. Sales ⇨147

Evidence sustained judgment canceling bill of sale of farm machinery to seller's son as fraudulently procured by his false representation that bill was merely security against loss on lease of farm to him by seller, if seller died and her other children refused to recognize lease, and by son's false promise to surrender bill to seller on demand.

2. Sales ⇨43(6)
Trusts ⇨95

A property transfer, obtained through grantee's actual or constructive fraud, will be set aside at grantor's instance, and grantee will be deemed to hold property as constructive trustee for grantor.

3. Cancellation of Instruments ⇨53
Trusts ⇨373

In suit to cancel mother's bill of sale of farm machinery to her son and impress trust for mother on property sold on ground that bill was procured through son's undue influence over mother, general findings that mother was not dominated by son and that no confidential relationship existed between them were not inconsistent with specific findings that son's false representation that bill was merely security against loss on lease of farm to him by mother was fraudulent, constituted undue influence, and overcame mother's will, in view of showing that general findings applied only to farm lease and mother's assignment to son of interest in hogs on farm.

4. Trial ⇨398

The trial court's special finding in conflict with his general finding controls.

5. Cancellation of Instruments ⇨60

The trial court's specific finding, supported by substantial evidence, that buyer exercised undue influence over seller in procuring bill of sale, sustained judgment canceling bill even if such finding was in conflict with general findings that seller was not dominated by buyer and that no confidential relationship existed between them.

6. Sales ⇨147

Evidence of want of consideration for mother's transfer of farm machinery to her son by bill of sale, mother's mental infirmity, parties' legal relationship, mother's lack of independent advice, persistent character of son's activities, and his fraudulent misrepresentation that bill was merely security against loss on lease of farm to him by mother, was sufficient to support finding of son's undue influence over mother in procuring bill, so as to sustain judgment canceling it.

7. Assignments ⇨64
Landlord and tenant ⇨24(1)

Evidence that mother's lease of farm and assignment of half-interest in hogs thereon to her son were supported by adequate consideration, mutually advantageous, fair and equitable, and entered into knowingly and voluntarily, warranted finding that disputable presumption of confidential relationship between parties and son's undue influence over mother was dispelled and burden of proving absence of such influence discharged by son, so as to sustain judgment upholding validity of lease and assignment in mother's suit for cancellation thereof.

8. Appeal and error ⚷1010(1)

The appellate court's duty to sustain trial court's findings, supported by substantial evidence, is not affected by fact that contrary evidence consists partly of a presumption.

9. Contracts ⚷96

A contract will not be set aside on ground of undue influence exercised over one party by the other, where no injury was suffered because of such influence and there was no abuse of confidence reposed.

10. Contracts ⚷96

Though fiduciary relation exists between parties, otherwise valid contract not within scope of such relation will be set aside only if there is abuse of confidential relation between parties, and mere lack of independent advice does not of itself change applicability of such rule.

◆

Appeal from Superior Court, Sacramento County; C. C. McDonald, Judge.

Action by Harriett E. Leathers against Loraine Leathers to cancel a farm lease, an assignment of a half interest in hogs on leased premises, and a bill of sale of farm machinery to defendant, impress a trust on property evidenced thereby, and require accounting for moneys and grain owing plaintiff. From the judgment rendered, both parties appeal.

Affirmed.

Robert H. Schwab, Jr., and E. L. Means, both of Woodland, for plaintiff.

A. G. Bailey, of Woodland, for defendant.

PEEK, Justice.

This is a controversy between mother and son based on certain transactions between them relating to the operation of a 108 acre ranch where they both were living and an additional 200 acres under lease from other persons. The mother had inherited a life estate therein from her deceased husband, the remainder vesting in six children, including defendant.

Defendant first worked on the ranch prior to his father's death for approximately $4. per day and thereafter continued to be employed by the mother at wages which ultimately were increased to $180 per month.

In 1938 plaintiff developed serious physical ailments which confined her to her home and bed and prevented her from thereafter taking any active part in the farming of the property. This condition continued more or less unabated throughout 1942. In October of that year, at defendant's request, plaintiff executed a lease of the farm to him for a term of three years on a share and share alike basis, and also executed an assignment to him of an undivided half interest in approximately 150 hogs then on the premises. In addition thereto on or about October 21st of the same year, defendant procured plaintiff's signature to a bill of sale of the farming machinery, including two tractors, a truck, and some mechanized equipment such as mower, plow and cultivator, of the value of $4000, which, according to the testimony of plaintiff and her son Charles and her daughter Reva, defendant agreed to return to her on demand.

In the spring of 1943 plaintiff made demand on defendant for the return of the bill of sale, and upon defendant's refusal to comply therewith the present action was instituted charging fraud and undue influence in the procurement of all the instruments and asking that they all be canceled, that a trust be impressed upon the property evidenced thereby, and that defendant be required to account for certain moneys and grain alleged to be owing to plaintiff. Defendant answered denying the allegations of the said complaint.

At the conclusion of the hearing on the issues so joined, the trial court found generally that the plaintiff was at all times mentally alert and competent to transact her own business, that she was not dominated by the defendant and was not a person susceptible to undue influence or easily imposed upon, and that there was no confidential relationship between the parties.

With respect to the lease and hog contracts, the court specifically found that they were made upon a good and valuable consideration, were fair and equitable, and were entered into knowingly and voluntarily without fraud or undue influence.

With respect to the bill of sale for the farming machinery, however, the court specifically found that while there was no consideration therefor it was not intended as a gift but was procured upon the representation of the defendant that it was merely a security to protect him against loss on the lease in case plaintiff should die and the other children refuse to recognize the lease, and that defendant promised he would surrender it to her upon demand. The court further found that said representation and promise were false and fraudulent and made with the intent to deceive and specifically that defendant had no intention of carrying out his promise to surrender the instrument. In addition, the court found that the defendant used undue influence in procuring the execution of the said bill of sale.

Accordingly it was adjudged that the lease and hog contracts were valid subsisting obligations, that the bill of sale was invalid, and that plaintiff was entitled to a cancellation thereof and the restitution of the property evidenced thereby or its value.

Defendant appeals from that portion of the judgment holding invalid the bill of sale, and plaintiff appeals from that portion holding valid the lease and hog contracts.

The main ground of defendant's appeal is that there is no substantial evidence of either fraud or undue influence in the procurement of the bill of sale which the court adjudged to be invalid. We are unable to agree with this contention in either regard.

[1] On the issue of fraud, it is true that plaintiff's account of the manner in which the transaction was entered into is rather meager; but the testimony of her daughter Reva and of her son Charles, coupled with the fact that the transfer was apparently without consideration (Nordholt v. Nordholt, 87 Cal. 552, 554, 555, 26 P. 599, 22 Am.St.Rep. 268; Reay v. Reay, 97 Cal.App. 264, 273-277, 275 P. 533) and what might be deemed to be the unsatisfactory character of the explanation given by defendant of his reasons for procuring the instrument and refusing to return it upon demand (Forbes v. Ring, 218 Cal. 726, 728, 24 P.2d 460; Daniel v. Sisnero, 109 Cal.App. 8, 10, 11, 292 P. 518) is sufficient to sustain the action of the trial court. Defendant did not at the trial, nor does he now, maintain that the transfer was intended as a gift, and his assertion that it was given as payment of a bonus of an undisclosed nature due him from plaintiff was flatly contradicted by her. As far as evidence of the unfulfilled promise is concerned, the declaration made by plaintiff in defendant's presence, which was received in evidence without objection, to the effect that he had promised to return the instrument, would have supported the finding that such a promise was made even if it had been denied by defendant. The further fact that defendant did not intend to carry out said promise when he made it was one that reasonably could be inferred from his words and conduct viewed in the light of the surrounding circumstances.

[2] In this regard the Supreme Court has stated the rule to be that:

"Where a transfer has been obtained through fraud, actual or constructive, it will be set aside at the instance of the grantor, and the grantee will be deemed to hold as a constructive trustee for the grantor." Johnson v. Clark, 7 Cal.2d 529, 535, 61 P.2d 767, 770. See also 12 Cal. Jur. p. 738, sec. 21.

[3] As we have previously stated, in addition to the finding of fraud the trial court found further that the bill of sale for the farming machinery had been procured through the exercise of undue influence.

On this issue defendant placed great emphasis on the inconsistency in the findings. The general findings, as we have noted, are to the effect that at no time was plaintiff dominated by the defendant and that no confidential relationship existed between the parties. The specific findings with reference to undue influence in the procurement of the bill of sale are: "That said representation by the said defendant to the said plaintiff was fraudulent and constituted undue influence by the defendant on the plaintiff. * * * That plaintiff's will was overcome by the said representation and said conduct as above set forth and constituted undue influence by the defendant on the plaintiff."

Besides, a specific finding of undue influence on this matter is contained in the trial court's memorandum of opinion, together with a discussion of the facts on which it is based, in the following language:

"The bill of sale of the implements is another matter. The defendant testified that his mother gave him the bill of sale in consideration of an indebtedness she owed him for a bonus and for turning the lease and beet contract on the Clark place back to him. The plaintiff testified that there was no such indebtedness and that such a matter was not discussed. The plaintiff's evidence showed that the defendant prevailed upon plaintiff to execute this bill of sale as security to protect him against loss on the lease in case she died and the children should refuse to recognize the leases and that he would surrender it to her upon demand. The evidence supports the plaintiff's contention. The defendant was unable to induce his brothers and sisters, owning in fee, to sign the lease. If the mother should die before the lease expired he would be out. The evidence shows the bill of sale was prepared after the defendant was aware of these facts. Furthermore, when the plaintiff had her son, Charles, call the defendant into the house and confronted him with his promise to return this bill of sale and demanded its return, he made no denial of the understanding but made a flat refusal to comply with her request to surrender it. The court finds that the defendant used undue influence and fraud in obtaining this document; that the defendant holds it as a trustee for his mother and that it should be surrendered to the court and canceled. The plaintiff was in no way indebted to the defendant. She had fully and amply paid him for his services. Consequently, there was no consideration for the bill of sale and there is absolutely no evidence that the plaintiff intended to make the defendant a gift."

It is readily apparent that if there is an inconsistency between the general and specific findings it is more superficial than real, and that the general language was actually intended to apply only to the occasions when the lease and hog contracts were executed and not to the transaction involving the bill of sale of the equipment.

[4, 5] In any event, the rule is clear that if a general finding conflicts with a special finding, the latter controls. 24 Cal. Jur., pp. 968, 974, secs. 202, 206. It follows therefore that if the specific finding of undue influence in the procurement of the bill of sale is supported by any substantial evidence it is sufficient to sustain the judgment.

[6] We cannot say as a matter of law that said finding is not supported by evidence. The want of consideration for the transfer, the physical and sporadic mental infirmity of the plaintiff, the legal relationship of the parties, the lack of independent advice, and the persistent if not importunate character of defendant's activities are facts from which undue influence could be inferred. See, Weakley v. Melton, 189 Cal. 44, 45-50, 207 P. 523, and cases therein cited. Furthermore the very proof of fraud might properly be considered as an added factor on the issue of undue influence. Restatement, Restitution, Supp. p. 148, sec. 166. And it is not unreasonable to conclude that while ordinarily plaintiff did not defer to defendant's wishes nor place implicit confidence in him, yet on this particular occasion and against her better judgment she did so. As the court stated in Estate of Olson, 19 Cal.App. 379, 386, 126 P. 171, 174, "history and experience teach that the minds of strong men and women have often been overborne, and they have been by a master mind persuaded to consent to what, in their sober and normal moments, and free from undue influence, they would not have done."

[7-9] This brings us to the appeal of plaintiff and the question whether the findings and conclusions upholding the validity of the lease and hog contracts are supported by substantial evidence.

Plaintiff contends that "The trial court erroneously misapplied the law of confidential relation and therefore cast a burden of proof upon the plaintiff contrary to the recognized law of this state", and that "Where a confidential relationship exists, a presumption of undue influence arises from any transaction by which the person in the superior position gains an advantage over the other, and the burden of proof shifts to such party to show fairness and good faith."

The question of the legal effect of the status between parent and child in transactions wherein the presumption of confidential relationship and the burden of negativing undue influence are in issue, is an interesting one and under other circumstances might present difficulties. See, for example, Herbert v. Lankershim, 9 Cal.2d 409, 426, 427, 481, 71 P.2d 220; Laherty v. Connell, 64 Cal.App.2d 355, 362, 148 P.2d 895; Steinberger v. Steinberger, 60 Cal.App.2d 116, 122, 123, 140 P.2d 31; 13 Cal. Law Rev. 174; Restatement, Restitution, Supp. p. 163, sec. 182. However, no such difficulties are presented in the instant case. The trial court has found on substantial evidence that there was adequate consideration for the contracts, that they were mutually advantageous, fair and equitable, and that they were entered into knowingly and voluntarily. Therefore, assuming that the legal relationship which existed between the parties plus the defendant's activity in procuring the execution of the contracts was sufficient to raise a presumption of actual confidence and made a prima facie case which cast upon defendant the burden of proving the absence of undue influence (see Johnson v. Clark, supra, 7 Cal.2d at page 534, 61 P.2d 767; Jorgensen v. Dahlstrom, 53 Cal.App.2d 322, 333, 334, 127 P.2d 551), still we must recognize the fact that the presumption is a disputable one (Wakefield v. Wakefield, 37 Cal.App.2d 648, 654, 99 P.2d 1105) and that it was competent for the trial court on the evidence disclosed by the record herein to find that the presumption had been dispelled and the burden discharged. Nessen v. Nessen, 218 Cal. 59, 61, 21 P.2d 415; Rocha v. Rocha, 197 Cal. 396, 407, 240 P. 1010; Wilbur v. Wilbur, 197 Cal. 1, 15, 239 P. 332; Best v. Paul, 101 Cal.App. 497, 499, 281 P. 1089. And of course the duty of an appellate court to sustain findings made upon substantial evidence is no different because the evidence to the contrary is made up in part of a presumption. Fanning v. Green, 156 Cal. 279, 282, 284, 285, 104 P. 308; Pierson v. Bradfield, 43 Cal.App.2d 519, 524, 111 P.2d 460; Stephenson v. Brand, 122 Cal.App. 543, 546, 10 P.2d 476. The significant factors in a case of this kind are the adequacy of the consideration and the general fairness and mutuality of the transaction (Carleton v. Bonham, 60 Cal.App. 725, 739, 740, 214 P. 503); and where no injury has been suffered by reason of the influence complained of and there has been no abuse of the confidence reposed, the transaction will not be set aside. 6 Cal. Jur., pp. 73, 74, sec. 42.

[10] "Although a fiduciary relation exists, an otherwise valid transaction between the parties which is not within the scope of the relation will be set aside if, but only if, there is an abuse of a confidential relation between the parties." Restatement, Restitution, p. 677, sec. 166.

It may be added that the mere lack of independent advice does not of itself change the applicability of this rule. 9 Cal.Jur., pp. 230, 231, sec. 107.

The judgment is affirmed, neither party to recover costs.

ADAMS, P. J., and THOMPSON, J., concur.

77 Cal.App.2d 129

LA CAVA v. BREEDLOVE et ux.

Civ. 15150.

District Court of Appeal, Second District,
Division 3, California.

Dec. 3, 1946.

1. Landlord and tenant 🔑297(1)

After termination of month to month tenancy by month's notice under statute, unlawful detainer action may be maintained by landlord against holdover tenants without first serving additional three-day notice to quit. Civ.Code, §§ 791, 1946; Code Civ.Proc. § 1161(1).

2. Appeal and error 🔑1011(1)

Where evidence is conflicting, judgment on fact findings sustained by any substantial evidence will not be disturbed.

3. Evidence 🔑397(1)

Extrinsic evidence is not admissible to add to, contradict, or vary terms of written contract.

4. Evidence 🔑429, 433(6), 437, 434(8), 448

A written contract is presumed to embrace all terms agreed on by parties, and no other evidence of such terms than contents of writing is admissible as between parties and their representatives or successors in interest, unless pleadings put in issue a mistake or imperfection in writing, validity of agreement is in dispute, or such evidence is necessary to explain extrinsic ambiguity or to establish illegality or fraud. Civ.Code, § 1625; Code Civ.Proc. § 1856.

5. Evidence 🔑393(1), 434(6)

A written lease nullified all previous and contemporary oral agreements contrary to its terms between parties thereto and was binding on them, in absence of fraud by landlord in procuring its execution.

6. Evidence 🔑441(4)

In landlord's unlawful detainer action against holdover tenants, evidence of plaintiff's oral promise to allow defendants to remain in leased premises as plaintiff's tenants for duration of war, though term of written lease was only one year, was properly excluded as attempt to substitute contemporaneous oral agreement for written lease and vary terms thereof, in absence of evidence that promise was made in bad faith or without intention to perform it.

7. Evidence 🔑441(4)

A written lease, being controlling evidence of its terms and conditions, cannot be changed by contemporaneous parol agreement between parties thereto.

8. Appeal and error 🔑110

An appeal does not lie from order denying a motion for new trial in civil case.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Unlawful detainer action by Gregory La Cava against Phil Breedlove and wife. Judgment for plaintiff, and defendants appeal.

Affirmed.

Louis P. Pink, of Los Angeles, for appellants.

Thomas D. Mercola, of Beverly Hills, for respondent.

DESMOND, Presiding Justice.

Defendants appeal from a judgment rendered in an unlawful detainer action in favor of plaintiff by a court sitting without a jury. The judgment decreed that "defendants, Phil Breedlove and Mrs. Phil Breedlove, are guilty of unlawful detainer of the premises described in the Complaint and that plaintiff Gregory La Cava be restored to possession of said premises; that the agreement under which said property is held was by its term expired and the same is hereby forfeited; that plaintiff have and recover from the said defendants the sum of $1,633.28, being the rent to May 11, 1945, and the further sum of $8.33 per day for every day after May 11, 1945, that defendants continue in possession plus interest thereon from said respective dates at 7% per annum, together with his costs taxed in the sum of $16.00."

On October 26, 1943, the plaintiff, as lessor, and defendant Phil Breedlove, as lessee, entered into a written lease by which the latter leased from plaintiff a furnished house at 22360 Roosevelt Highway, Malibu LaCosta, Pacific Palisades, California, for a term of twelve months, commencing October 26, 1943, at a rental of $125 per month "for the months of October, 1943 to and including the month ending May 26, 1944," and at $250 per month thereafter, namely, "for the months beginning May 26, 1944 and ending on October 25, 1944." The lease further provided that if the lessee held over the term "such holding shall be construed to be a tenancy only from month to month."

After the termination of the lease year, i. e., October 25, 1944, defendants tendered to plaintiff $125 per month for the rental of the premises, but the payments were refused by plaintiff. On January 18, 1945, plaintiff terminated said tenancy by serving upon defendant Phil Breedlove a notice to vacate and quit the premises "upon the expiration of one month after the service upon you of this Notice," and on February 28, 1945, filed the present unlawful detainer action.

The lease and the notice to vacate and quit were introduced at the trial. Plaintiff testified that he had not received possession of the premises in accordance with his notice and that $250 per month was the reasonable rental value of the premises since October 26, 1944. Defendant Phil Breedlove testified that the reasonable rental value of the property during the winter months was $125, and for the summer months not over $250 per month. By way of defense, defendants attempted to introduce an alleged conversation between defendant Phil Breedlove and plaintiff respecting certain preliminary negotiations made prior to the execution of the lease to the effect that the defendants were to retain possession of the premises for the duration of World War Two and that the lease agreement was to be entered into merely for the purpose of showing the rental breakdown for a twelve months' period. (Defendants, in their answer, had alleged that they were induced to sign the one year lease by the false and fraudulent representation of the plaintiff in regard to the matters just mentioned.) Upon plaintiff's objection to this evidence being sustained, defendants made an offer to prove the conversation relative thereto, after which the court said: "I think, in view of the offer of proof, that not only is the parol evidence rule violated, but the statute of frauds as well. Objection is sustained." The correctness of this ruling to which defendants take exception is discussed infra.

The court found that plaintiff had been the owner of the premises at all times since October 10, 1940; that the premises had been rented by defendants for a twelve-month period under the lease of October 26, 1943, which period ended October 25, 1944, and under which the monthly rental to be paid was $125 up to and including May 26, 1944, and $250 per month thereafter to the end of the term; that the lease provided that any holding over at the expiration of the term should be a month to month tenancy; that after October 25, 1944, plaintiff, in good faith, proceeded to recover possession of the premises for his immediate use and occupancy and in accordance with the rent regulations of the Office of Price Administration, stating as grounds Section 6 (a)(6) of said regulations, and on January 18, 1945, served upon defendants a notice to vacate and a termination of the month to month tenancy; that since February 18, 1945, defendants have unlawfully detained the premises; that the reasonable rental value of the premises since October 25, 1944, and that registered in the Rent Division of the Office of Price Administration, was $250 per month and that since October 25, 1944, defendants have not paid rent to plaintiff for the use of the premises; that it was untrue that plaintiff on or about October 26, 1943, orally agreed with defendants they could have possession of the premises for the duration of World War Two, or falsely and fraudulently represented to defendants that if the lease was signed it was upon the express understanding that the term would be for the duration of World War Two or that the monthly rental would be less in the winter months than in the summer months after October 25, 1944.

[1] Appellants' contention that the trial court was without jurisdiction to try the instant case because no three-day notice to quit the premises had ever been served upon defendants is without merit and has been

satisfactorily answered in Palmer v. Zeis, 1944, 65 Cal.App.2dSupp. 859, 151 P.2d 323. Section 791 of the Civil Code provides that no three-day notice is necessary "where the hiring of real property is for a term not specified by the parties and where such hiring was terminated under and in accordance with the provisions of section 1946 of the Civil Code." This latter section provides that unless the rental agreement itself provides for a shorter notice period, a month to month tenancy may be terminated by a month's notice. Thereafter, an unlawful detainer action may be maintained under subdivision (1) of section 1161, Code of Civil Procedure without the necessity of first serving an additional three-day notice. Palmer v. Zeis, supra.

[2] Appellants further argue that the court erred in awarding $250 per month "as rent for the use and occupation of the premises involved in this litigation for the period commencing October 26, 1944 and continuing to the date when the possession of the premises was surrendered to the owner." Evidence introduced by both parties as to the reasonable value for the use of the premises was conflicting and, therefore, this case clearly falls within the well-settled rule of appellate practice that where there is any substantial evidence to sustain the findings of fact the appellate court will not disturb the judgment of the trial court.

[3, 4] Proceeding now to discuss the claimed error on the part of the trial court in refusing to admit evidence of the alleged conversation between the parties at the time of and prior to the execution of the lease, we have in mind the elemental rule that extrinsic evidence is not admissible to add to, contradict or vary the terms of a written contract. We have in mind, also, the reason for the rule—that when the terms of an agreement have been reduced to writing, it is presumed to embrace all the terms agreed upon and there can be, between the parties and their representatives or successors in interest, no other evidence of the terms of the agreement than the contents of the writing, except (1) where a mistake or imperfection in the writing is put in issue by the pleadings, (2) where the validity of the agreement is in fact in dispute, (3) or "to explain an extrinsic ambiguity, or to establish illegality or fraud." Code Civ.Proc., sec. 1856; Civ.Code, sec. 1625. It is clear that the instant case does not fall within the first or second clause; neither do appellants claim that the lease is ambiguous or illegal.

[5-7] The written lease nullified all previous and contemporary oral agreements contrary to its terms which may have been made and was binding upon the parties, unless its execution was procured by means of fraud on the part of plaintiff. The substance of the alleged representation was that plaintiff would allow defendants to remain in the premises as his tenants for the duration of the war, although the term of the written lease was only one year. It was not alleged in the answer, and defendants did not offer to prove, that plaintiff made the alleged promise without intending to perform it. The characterization of the alleged promise as false and fraudulent was not the equivalent of an allegation that the promise was made without intention to perform it, where it was also alleged that plaintiff at the same time, and presumably in good faith, orally agreed that defendants might remain in the premises for the duration of the war. Defendants offered to prove nothing more than that plaintiff made the alleged promise; there was no offer to prove any fact which would indicate that it was made in bad faith or without intention to perform it. Defendants attempted to show no more than that at the time the lease was executed plaintiff orally leased the property to them for a term different from the one fixed by the terms of the lease. The showing which they attempted to make was insufficient to establish fraud on the part of plaintiff in procuring the execution of the lease. The offered evidence was therefore properly excluded, for the reason that it was no more than an attempt to substitute the contemporaneous oral agreement for the written one. If it had been admitted the ultimate effect would have been to vary the terms of the written lease, and since the lease itself is controlling evidence of its terms and conditions, it could not be changed by any contemporaneous parol agreement and, there-

fore, the court did not err in refusing its admission.

[8] An appeal does not lie from an order denying a motion for a new trial in a civil case; therefore, the purported appeal from the order denying the motions for new trial is dismissed. Gray v. Cotton, 1917, 174 Cal. 256, 162 P. 1019. The judgment is affirmed.

SHINN and WOOD, JJ., concur.

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77 Cal.App.2d 148

FICKEISEN v. PEEBLER et al.

Civ. 15475.

District Court of Appeal, Second District, Division 3, California.

Dec. 4, 1946.

Hearing Denied Jan. 30, 1947.

1. Appeal and error 🔑957(1)
Judgment 🔑139

The grant or denial of a motion to relieve a party from default is addressed to sound discretion of trial court, and, in the absence of a clear showing of abuse of discretion, an appellate court will not disturb order, especially where trial court grants relief after it has been promptly sought and it does not appear that adversary has sustained any prejudice. Code Civ.Proc. § 473.

2. Appeal and error 🔑957(1)

Appellate tribunals generally will not disturb action of a trial court in setting aside a default where there is room for doubt as to sufficiency of excuse for a default. Code Civ.Proc. § 473.

3. Judgment 🔑162(4)

Evidence that plaintiff's attorney erroneously believed he had effected a dismissal without prejudice of action without necessity of a personal appearance by plaintiff at time set for trial, and that attorney and plaintiff could have been present if either clerk or opposing counsel, both of whom had knowledge, had advised plaintiff of the situation, authorized finding of excusable mistake and grant of relief to plaintiff from default judgment recovered by defendant. Code Civ.Proc. § 473.

4. Judgment 🔑143(3, 16)

Ignorance of the law on the part of an attorney is not ordinarily a sufficient ground for setting aside a default judgment, although the court will, in a proper case, grant relief against a mistake of law. Code Civ. Proc. § 473.

5. Judgment 🔑143(2), 145(2)

Before a plaintiff can properly ask trial court to exercise its discretion in his favor by setting aside a default judgment in favor of defendant, he must show a good excuse for default of appearance at trial and also a meritorious defense to affirmative matter contained in defendant's answer. Code Civ.Proc. § 473.

6. Judgment 🔑145(4)

Plaintiff's verified complaint in quiet title action containing allegations of ownership, and affidavit of merits by plaintiff's attorney, constituted a sufficient showing of meritorious defense to affirmative matter contained in answer so as to authorize the vacation of a default judgment in favor of defendant, an excusable mistake having been established and defendants having failed to show any prejudice. Code Civ. Proc. §§ 462, 473.

7. Appeal and error 🔑1024(4)

The action of trial judge in resolving conflict in affidavits submitted by opposing counsel in connection with motion for relief from a default judgment will not be disturbed on appeal. Code Civ.Proc. § 473.

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by H. C. Fickeisen, trustee in bankruptcy for Graceland, a corporation, against Byron Peebler and another to quiet title to certain cemetery property. Defendants secured a judgment for the affirmative relief prayed in their answer when plaintiff failed to appear for trial, believing that the action had been dismissed without prejudice. From an order granting plaintiff's motion to vacate the judgment, set aside default, add new defendants, and have summons issue, defendants appeal.

Affirmed.

Roland Maxwell, of Pasadena, for appellants.

H. A. Andrews, of Los Angeles, for respondent.

KINCAID, Justice pro tem.

The appeal of the defendants Byron and Ethel M. Peebler, taken herein, is from the order made on January 14, 1946, granting plaintiff's motion under section 473, Code of Civil Procedure, to vacate judgment, set aside the default, add new defendants and have summons issue. The action out of which such motion arises is one of a succession in the litigious history of a small cemetery known as Olive Lawn Memorial Park located near Norwalk, California. Graceland v. Peebler, 1942, 50 Cal.App.2d 545, 123 P.2d 527; Peebler v. Olds, 1942, 56 Cal.App.2d 8, 132 P.2d 233; Peebler v. Olds, 1942, 56 Cal.App.2d 13, 132 P.2d 236; Olds v. Peebler, 1944, 66 Cal.App.2d 76, 151 P.2d 901; Peebler v. Olds, 1945, 71 Cal. App.2d 382, 162 P.2d 953; Peebler v. Olds, 1946, Cal.Sup., 170 P.2d 1.

The plaintiff herein, in the capacity of trustee in bankruptcy of Graceland, a corporation, brought this suit against defendants for an accounting and to quiet title, claiming the ownership in the corporation of such cemetery property. The defendants Peebler answered, denying all allegations as to plaintiff's claim of right or title therein and set up numerous affirmative defenses terminating with a prayer that plaintiff take nothing and for the affirmative relief that it be adjudicated that Graceland has no right, title or interest whatsoever in or to the real property described in the complaint.

The above described motion was served and filed within one month of the rendition of judgment and was made upon the record of the case and the affidavit of J. M. Danziger, filed both in his capacity as attorney for the plaintiff and president of the bankrupt corporation. The motion was opposed by an affidavit of defendants' counsel. From such affidavits and other brief record on appeal it appears that the case was regularly set and notice for trial on August 31, 1945, and although plaintiff's counsel, several days prior to such date, requested the consent of defendants' attorney to a continuance of the trial, the latter refused. On August 28, 1945, Danziger advised plaintiff, his client, that in order to properly maintain the quiet title action herein it would be necessary to bring in additional parties as defendants and that because of this fact the case should be dismissed without prejudice. Danziger thereupon on said date, in accordance with the instructions of his client, filed with the county clerk a written dismissal of the action without prejudice and on the following day a copy thereof was served upon defendants' attorney. The latter, upon receiving such notice, proceeded to the office of the county clerk and called to the attention of that official the fact that the answer of defendants included a prayer for affirmative relief thus preventing the acceptance of such dismissal for filing. On August 31, 1945, the defendants and their counsel appeared in court for the trial but plaintiff and his attorney did not so appear. Defendants' attorney then telephoned to Danziger and advised him that he had better have the plaintiff appear as the case was going to trial. Upon Danziger's reply to the effect that the case had been dismissed, defendants' attorney told him that defendant was going to proceed to trial and Danziger replied, "go ahead and do as you like." The first notice which plaintiff or his counsel received of the refusal of the clerk to accept the dismissal of the action for filing was through letters from the clerk on September 5 and 6, 1945, officially advising them of this fact.

Such of the foregoing facts as occurred on and before August 31, 1945 were called to the attention of the trial judge by defendants' counsel and the latter's request for permission to introduce evidence pursuant to the affirmative defenses of the answer, and for affirmative relief, was granted. After receipt of such evidence the trial judge ordered judgment in defendants' favor.

[1,2] "The granting or denying of a motion to relieve a party from default under section 473, Code of Civil Procedure,

is a matter 'addressed to the sound discretion of the trial court, and, in the absence of a clear showing of abuse in the exercise thereof, an appellate court will not disturb the order of the court below' (Waybright v. Anderson, 1927, 200 Cal. 374, 375, 253 P. 148, 149); especially is this true where the trial court grants the relief, after it has been promptly sought, and it does not appear that the plaintiff has sustained any prejudice thereby. Weck v. Sucher, 1929, 96 Cal.App. 422, 424, 425, 274 P. 579. Hadges v. Kouris, 1945, 71 Cal.App.2d 213, 214, 162 P.2d 476, 477. See Beard v. Beard, 1940, 16 Cal.2d 645, 647, 107 P.2d 385; Bonfilio v. Ganger, 1943, 60 Cal.App.2d 405, 510, 140 P.2d 861. "Because of this well settled principle of law the appellate tribunals follow the practice of not disturbing the action of a trial court in any case where there is room for doubt as to the sufficiency of the excuse for a default * * *." Schoenfeld v. Gerson, 1941, 48 Cal.App.2d 739, 742, 120 P.2d 674, 675.

[3] In the present case the motion to vacate the judgment was promptly made. Although other extraneous matter is contained in the affidavits the motion quite evidently was granted by the trial judge upon the basis of the showing by plaintiff of his reliance upon the act of serving on opposing counsel, and leaving with the county clerk for filing, a dismissal of the action as having the effect of terminating the same without the necessity of a personal appearance at the time and place of trial. The oversight of plaintiff's attorney in failing to realize that the prayer for affirmative relief in the answer would prevent the filing of such dismissal by the clerk could have been recovered by him in time to have presented himself and client at the trial scene if either the clerk or opposing counsel, both of whom had knowledge, had advised him of the fact.

[4] Although ignorance of the law on the part of an attorney is not ordinarily a sufficient ground for setting aside a default judgment under section 473, Code of Civil Procedure, it is a recognized rule that the court will, in a proper case, grant relief against a mistake of law which has resulted in a situation like that which here confronts the plaintiff. Schoenfeld v. Gerson, supra, 48 Cal.App.2d 739, 743, 120 P.2d 674; Bonfilio v. Ganger, supra, 60 Cal.App.2d 405, 410, 140 P.2d 861; Beard v. Beard, supra, 16 Cal.2d 645, 648, 107 P.2d 385; Williams v. Thompson, 1923, 60 Cal.App. 658, 660, 213 P. 705. Under the existing conditions here shown the trial judge was justified in holding the mistake to have been excusable.

[5, 6] Before plaintiff can place himself in a position whereby he may properly ask the trial court to exercise its discretion in his favor, however, he must show not only a good excuse for the default of his appearance at the trial, but also that he has a meritorious defense to the affirmative matter contained in defendants' answer. In making this showing plaintiff herein has not only the benefit of the provisions of section 462, Code of Civil Procedure, whereby the statement of any new matter in the answer in avoidance or constituting a defense or counterclaim must be deemed to be controverted by him, but plaintiff also has on file his verified complaint wherein facts are alleged showing his bankrupt principal to be the owner of the real property in question and defendants to be without any right, title or interest whatsoever therein or thereto. Beard v. Beard, supra, 16 Cal.2d pp. 648, 649, 107 P.2d 385; Salsberry v. Julian, 1929, 98 Cal.App. 638, 642, 277 P. 516.

[7] In addition to these factors the trial judge had before him for consideration, in ruling upon such motion, the above mentioned affidavit or merits of J. M. Danziger. In both the capacity of attorney for plaintiff and as president of the bankrupt corporation for which plaintiff appears as trustee, affiant states that he is familiar with all the facts and it is his own belief, as well as his advice to his client, that plaintiff has a good and sufficient legal defense to any and all of the claims asserted by defendants to any part of the real property which is the subject of the controversy. He then sets forth allegations by way of defense to defendants' claims which, if supported by proof and believed by the trial court, would constitute a defense thereto, either in whole or in part.

The affidavit of the attorney for defendants contradicts portions of such allegations, but on this appeal, the action of the trial judge in resolving the conflict will not be disturbed. Hadges v. Kouris, supra, 71 Cal.App.2d 213, 217, 162 P.2d 476.

The defendants have failed to make any showing whereby they have sustained any prejudice by the order of the court appealed from. Under all of the existing circumstances it appears that the act of the court in vacating the judgment was a proper one and that justice will be promoted by giving the parties an opportunity to determine the issues upon the merits.

The order appealed from is affirmed.

DESMOND, P. J., and SHINN, J., concur.

77 Cal.App.2d 90

SALAS v. WHITTINGTON et al.

Civ. 15236.

District Court of Appeal, Second District,
Division 1, California.

Dec. 2, 1946.

Rehearing Denied Dec. 19, 1946.

Hearing Denied Jan. 30, 1947.

1. Pleading 🔑192(2)

In action for injuries sustained by child playing in yard behind double house in which he resided, complaint alleging that child's family rented one side of double house with its back yard, and that child used back yard as playground, and that manufacturer whose establishment enjoined the back yard deposited therein the empty can causing injuries, was not subject to demurrer for uncertainty, because of use of term "back yard", where complaint was predicated on theory that child's family had right to use entire back yard.

2. Appeal and error 🔑1040(10)

The overruling of demurrer to complaint on ground of uncertainty affords no ground for reversal where it is apparent from record that the defendant was not thereby misled in making his defense.

3. Explosives 🔑7

Evidence warranted finding of negligence of manufacturer sued for injuries sustained by eight-year old child from combustion emanating from manufacturer's can which contained residue of shellac and alcohol and which was in yard back of double house on one side of which child lived and in which yard the child was playing.

4. Explosives 🔑7

In action against manufacturer for injuries sustained by eight-year old child from combustion emanating from manufacturer's can which contained residue of shellac and alcohol and which was in yard back of double house on one side of which child lived and in which yard child was playing, evidence was insufficient to show that manufacturer deposited can in portion of yard inclosed by manufacturer and that can was removed therefrom by the playing children, as respects whether there was an intervening agency relieving manufacturer of liability.

5. Negligence 🔑136(25)

The issue of proximate cause is essentially one of fact.

6. Appeal and error 🔑1050(1)

In action against manufacturer for injuries sustained by eight-year old child from combustion emanating from manufacturer's can which contained residue of shellac and alcohol and which was in back yard in which child was playing, admission of ordinance prohibiting person in charge of land from storing thereon combustible waste material constituting a fire hazard, was not reversible error, where evidence was conflicting as to manufacturer's right to use yard and as to how can reached place of explosion.

7. Trial 🔑349(2)

In action against manufacturer for injuries sustained by eight-year old child from combustion emanating from manufacturer's can which contained residue of shellac and alcohol and which was in back yard in which child was playing, refusal to submit requested interrogatory whether can had been deposited in area of yard inclosed by manufacturer and had been removed therefrom by manufacturer was not abuse of discretion, in view of statute making it optional with trial court whether special issues should be submitted to jury. Code Civ.Proc. § 625.

8. Negligence ⚷138(3)

In action for injuries, refusal to give requested instruction concerning trespassers was not error where child at time of injury was in his parent's portion of back yard and not in defendant's fenced-in portion.

9. Trial ⚷251(8)

In action for personal injuries sustained by child when can exploded in back yard in which child was playing, refusal to give attractive nuisance instruction was not error where such theory had been eliminated by the sustaining of a demurrer to second cause of action contained in original complaint.

10. Explosives ⚷7

In action for personal injuries sustained by child when can exploded in back yard in which child was playing, evidence was insufficient to show that child was guilty of negligence which proximately contributed to his injuries.

YORK, P. J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Personal injury action by Alfred C. Salas by his guardian ad litem, John Salas, against Weldon Bailey Whittington, individually and doing business as Logan & Whittington, and Mrs. F. E. Woodson. From a judgment for the plaintiff against Weldon Bailey Whittington, individually and doing business as Logan & Whittington, such defendant appeals.

Affirmed.

William K. Young, of Los Angeles, and David Lynn, of Inglewood, for appellants.

Francis J. Gabel, of Los Angeles (Jean Wunderlich, of Los Angeles, of council), for respondent.

DORAN, Justice.

This action was brought by an eight year old boy, to recover damages for personal injuries which resulted from an explosion or combustion emanating from a five gallon shellac can belonging to the appellants. The amended complaint alleged that the boy's father had "for a long time prior" to the accident, rented one side of a double house at 192 Jefferson Street in Los Angeles, "with its back yard", and that plaintiff and other neighborhood children had "for a long time * * * used said back yard as a playground", which facts were at all times known to appellants. It was further alleged that some time prior to August 27, 1944, the date of the accident, Mrs. F. E. Woodson, owner of the premises, had, without the consent of plaintiff's father, "permitted a portion of the yard to be used" by the appellant Whittington who maintained a manufacturing establishment adjoining the Salas back yard; that Whittington thereafter deposited in said back yard various substances and objects used in connection with the business, including certain shellac cans similar to the one in question. The answer avers that these cans, after being emptied by appellants, "were deposited in a box in said enclosed area", referring to a portion of the back yard which appellants had fenced in. Plaintiff's case was predicated upon the theory that appellants had "negligently and carelessly deposited * * * in the said back yard, a can containing such combustible liquids (apparently a residue of shellac and alcohol) within easy reach of the plaintiff and other children wanting to play in said premises". The complaint further alleged "That during the time said children played with such container containing such combustible liquids, the said liquid became ignited when a match struck by one of the children came in contact therewith", resulting in third degree burns to the plaintiff. A demurrer to the amended complaint, on the ground of uncertainty, was overruled.

The answer, denying all negligence, alleged that appellant rightfully occupied the fenced-in portion of the yard by a month to month lease from the owner, with, the consent of plaintiff's mother; further, that the neighborhood children trespassed upon such enclosed portion, and that on the day of the accident some child climbed over the fence into appellant's enclosure and removed a shellac can to the Salas part of the back yard; that thereafter some child "of said group set fire to a stick of wood and inserted same into said can through the mouth thereof, whereby the shellac * * * caught fire and severely burned plaintiff who was standing in close proximity thereof". Contributory negligence was pleaded as an affirmative defense. Trial of the case before a jury resulted in a verdict and judgment for plaintiff in the sum of $10,000, from which this appeal is prosecuted.

[1, 2] The appellants' first contention is that a special demurrer to the amended complaint, for uncertainty, ambiguity and unintelligibility should have been sustained because of plaintiff's use of the terms, "back yard", "portions of the yard", "said premises", and the like. The respondent maintains, however, that the Salas family claimed the right to use the entire back yard, upon which theory the complaint was predicated; further that "defendants made no nice or fine distinctions * * * as to just where they deposited the materials which they brought in". While it is true, as appellants maintain, that "Our system aims at certainty", in the present case there appears to be no serious defect in this respect; and in view of plaintiff's theory, and the exposition thereof in the complaint, the overruling of the demurrer cannot be deemed error. Moreover, as mentioned in the respondent's brief, "The overruling of a demurrer to a complaint on the ground of uncertainty or ambiguity affords no ground for reversal when it is apparent from the record that the defendant was not thereby misled or embarrassed in making his defense." (2 Cal.Jur. 1014.)

In reference to appellants' assertion that the evidence is insufficient to support the judgment, it is to be observed that the record is full of conflict, with little agreement among the various witnesses as to what took place preceding the respondent's injury. For example, there is serious conflict concerning the appellants' right to fence in or use any portion of the Salas back yard. The landlady, Mrs. Woodson, who might reasonably be expected to have information on this point, was not called as a witness by either party. The record is equally unsatisfactory as to how the shellac can got where it was at the time of the explosion,–whether left there by the appellants or carried there from appellants' enclosure by some boy or other person. Nor is it clear as to what was the exact cause of the explosion, except for a vague report that some boy made use of a lighted stick. Again it appears that one of the boys present at the explosion, Raoul Gordon, who might have explained this matter, was not called as a witness. The entire record is, in fact, a hodge podge of conflict and uncertainty.

[3] There is, however, abundant evidence from which the jury could find that the shellac can, containing a residue of shellac and alcohol, was the property of appellants; that about 7:00 a.m. on the morning of the accident this can was in the respondent's back yard not far from the house, at which time Alfred Salas, aged about 8 years, Gilbert Salas, aged about 10 years, and Raoul Gordon, aged about 8 years, were playing in the yard. When Alfred Salas "was about 5 feet away looking backward", the can or its contents "blew up", and respondent testified that "when it exploded I tried to run and the fire caught my pants leg" resulting in serious injury to the respondent. There was evidence that the neighborhood boys made a practice of playing there, and that this fact was known to the appellants who had found it necessary at various times to drive some of the boys away from the fenced-in portion of the yard which appellants claimed the right to use. There was also evidence from which the jury could find that notwithstanding this knowledge, the gate in appellants' fence was left open and unlocked, although this fact was denied by appellants. It appeared that much material, including cans similar to the one in question, was, from time to time, brought into the back yard by appellants, although the exact place of leaving such material was in conflict. There was evidence from which, as noted in respondent's brief, the jury could "find the defendants negligent in the precaution which they took to prevent this dangerous article (shellac and alcohol used to cut the shellac) from being scattered about", having in mind the

activities of the children accustomed to play in the back yard. The testimony of John Urista, acting maintenance foreman for appellants, indicates that some fear had been entertained for the safety of these young children. Explaining why the boys were told to get out of the fenced-in portion of the yard, this witness said: "Because in the first place they didn't have no business there, and probably somebody would be coming around there with something or other, and one of the kids would probably get hurt by some molds that they might get into." The close proximity of the Salas household and the appellants' plant, in connection with the known activities of the youthful members of that household, and the appellants' use of combustible and explosive substances, were circumstances of considerable importance bearing upon the question of appellants' negligence. Under the usual rule relating to a review of judgments based upon conflicting evidence, it cannot be said that there was not substantial evidence upon which to base the jury's finding that appellants were negligent.

[4] It is appellants' contention that "The independent act of purloining the can from appellants' enclosed and protected premises and the independent act of one of the children igniting the remaining contents of the can constitute unforeseeable intervening and proximate causes of respondent's injuries and exonerate appellants." However, as pointed out in respondent's brief, under the evidence the jury "was not at all required to assume that the can in question had been originally deposited in that portion of the yard which they had enclosed", nor was the jury required to assume that the can had been "purloined" and removed from the enclosed portion. There was no evidence as to how the can had reached the place of explosion. As hereinbefore mentioned, there was evidence that appellants' gate was not kept closed or locked.

[5] The issue of proximate cause "Is essentially one of facts", and "It is not always true that an intervening agency will relieve defendant of responsibility". Mosley v. Arden Farms Co., 26 Cal.2d 213, 219, 220, 157 P.2d 372, 375, 158 A.L.R. 872. Particularly applicable to the present case is the language of Katz v. Helbing, 205 Cal. 629, 634, 271 P.1062, 1064, 62 A.L.R. 825: "Intervening wrongful acts of third persons, but for which injuries complained of would not have been received, ordinarily break the chain of causation, because they are not to be anticipated as probable consequences, but are occasional and exceptional results. But this is not always the case, especially where the acts of children of a nonresponsible age are involved". And in this connection may be noted the following language at page 636 of 205 Cal., at page 1065 of 271 P.: "It cannot be said as a matter of law that an eleven year old boy, presumed to possess average intelligence for one of his years, since the contrary is not alleged is such a responsible agent". In the instant case, the boys in question were of the ages of 8 and 10 years. In Smith v. Smith-Peterson Co., 56 Nev. 79, 45 P.2d 785, 48 P.2d 760, 100 A.L.R. 440, it was held that the act of other children in picking up and carrying away from defendant's premises a dynamite cap attached to a piece of fuse, left unguarded and accessible to children, by the explosion of which another child was injured, cannot be said as a matter of law to have been the proximate cause of the injury, unless their acts could not have been reasonably foreseen. In the annotation in 100 A.L.R. 452, following the Nevada case, it is stated that the rule to the effect that "one using or keeping explosives must use a degree of care commensurate with their dangerous nature, to prevent injury to children who may have access to or come in contact with them, has been uniformly recognized and maintained". It should here be noted that the doctrine of attractive nuisance is not involved in the present case, nor in the annotation just cited.

[6] Reversible error is also charged in the admission in evidence, over appellants' objection, of Los Angeles Municipal Code, Section 57.24, subsection C, being an ordinance providing that "No person owning or having charge or control of any parcel of land or premises shall store or allow to exist thereon any dry grass, weeds, hay, straw, paper, wood, sacks, bags, litter, waste petroleum or any dry vegetation,

standing or otherwise, or any combustible waste material of any nature, which occasions or constitutes a fire or life hazard". In this connection it is urged that "The appellants did not own, or have charge of or control that portion of the yard where the can was located at the time of the accident"; further, that if appellants did violate such ordinance, this was "remote to the causes of respondent's injuries and was not a proximate cause thereof". However, as said in the respondent's brief, "If the contention of appellants were true that the can was deposited inside the enclosed portion of the yard, the prohibition of the ordinance applied to that place as well". In view of the state of the record hereinbefore commented upon, and the diverse theories of the respective parties, no reversible error appears in reference to this point.

[7] The appellants' complaint that the trial court erroneously refused to submit to the jury a requested interrogatory requiring the jury to find whether the shellac can in question "had previously been deposited in the area enclosed by the answering defendants and had not been removed therefrom or deposited in the Salas open back yard by the answering defendants?", is answered by the provisions of Section 625 of the Code of Civil Procedure, making it optional with the trial court whether special issues shall be submitted to the jury. No abuse of discretion is apparent.

[8, 9] It is also contended that the trial court erred in refusing to give appellants' requested instructions covering the subject of trespassers, and concerning the nature of the can as "an attractive plaything for children". In reference to the first request, the record discloses no evidence whatsoever that, with respect to the accident in question, the plaintiff had been guilty of any trespass; the eight old boy was, at the time of the explosion, in what is conceded to have been the Salas back yard, and not in the appellants' fenced-in portion. In reference to the refusal of an instruction on the subject of attractive nuisances, this theory of the case had been eliminated from consideration by reason of the sustaining of a demurrer to the second cause of action contained in the original complaint.

[10] The appellants' further contentions that the trial court erred in denying motions for a nonsuit and for a directed verdict, and that "respondent's testimony establishes his own negligence which proximately contributed to his injuries", as a matter of law, must likewise be resolved against such contentions. The questions involved were, as already indicated, for the jury to decide, and there is substantial evidence in the record to support the verdict and judgment.

The judgment is affirmed.

WHITE, J., concurs.

YORK, P. J., dissents.

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77 Cal.App.2d 190

FONTANA FARMS CO. v. CRISS et al.

Civ. 3447.

District Court of Appeal, Fourth District, California.

Dec. 9, 1946.

1. Covenants 🔑103(3)

Corporation, which sold townsite lots subject to building restrictions, by consenting that lot classified as within a residence district might be used for either residence or business purposes, so as to bring it within the classification of combined residence and business district, was estopped from thereafter claiming a breach by owners of lot of any restrictions pertaining to lots in a residence district.

2. Covenants 🔑103(3)

Where company, selling lots subject to building restrictions, told buyers of lot when it sold lot that they could erect a store building thereon, though lot was in residential section, and corporation approved plans and specifications for erection of building, and stood by and watched its completion, though company had not obtained required consent of owners of one-half of the property in the district to modify building restrictions, equity would not aid company in its subsequent endeavor to enforce certain setback restrictions applicable to a residence district.

3. Covenants 🔑1, 79(3)

Building restrictions, expressly made in a deed to a lot for the benefit of other lots in the same tract, are valid and enforceable by the owners of the other lots.

4. Injunction 🔑190

Judgment permanently enjoining owners of lot in townsite, wherein there were certain building restrictions, from constructing any building within 25 feet of boundary line on certain street, was erroneous, where restrictions were soon to expire unless extended for another 10 years as provided in instruments creating the

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Suit by Fontana Farms Company, a corporation, against Paul C. Criss, and Helen M. Criss to enjoin defendants from erecting or maintaining certain structures on lot in townsite in violation of reservations and restrictions. From an adverse judgment, the defendant appeals.

Judgment reversed.

Henry F. Rager, of Fontana, for appellants.

Surr & Hellyer, of San Bernardino, for respondent.

GRIFFIN, Justice.

Defendants and appellants Paul C. Criss and Helen M. Criss, in 1938, purchased from plaintiff, Fontana Farms Company, a corporation, hereinafter referred to as the "Company," lot 14, block 59, Fontana Townsite, under a contract of sale.

The contract recites that "minimum cost of building shall be $2,000, store building to be completed within one year from date, plans to be approved by building inspector. Copy of Fontana Townsite declaration attached to this receipt." At the time this agreement was signed there had been recorded an amended "declaration of the reservations and restrictions * * * affecting Fontana Townsite," which amended declaration classified the lot here involved as being in a "residence district," and provided that all property within said district should be used for private residence purposes only and that all structures erected should be in accordance with the Company's building code, and that plans and specifications must be approved by it and building permits issued for their construction. The instrument also specified certain other lots as being within the "business district" and others in "combined residence and business district" and others in the "industrial district." Provision was made therein for amendments or changes in the "declaration" and that any of the restrictions or agreements contained therein, with certain exceptions pertaining to liquor and race restrictions, may be waived, or changed by the Company, *with the consent of the owners of one-half of the property in any district;* that the provisions of the declaration may be enforced by the Company or by the owner of any property in the townsite; that each restriction should be deemed independent of any other; that all the restrictions mentioned should continue until January 1, 1937, and may be extended as to any particular district for a period of ten years thereafter and for successive periods of ten years, without limitation, by the assent "evidenced by appropriate agreement of the owners of one-half in area of the property shown on said map in said district, and with the consent of the Company."

It is agreed that there has been one ten-year extension of the restrictions and that unless extended again the restrictions here involved will expire on January 1, 1947.

Lot 14 was a corner lot with 50-foot frontage on Nuevo Avenue, which avenue runs north and south, and had a 180-foot frontage on Merrill Avenue, which avenue runs east and west. Each avenue is 60 feet in width. Lot 14, block 59, and the lots immediately north of it originally had a structural set-back of 40 feet from the front property line of Nuevo Avenue.

From the evidence it appears that several years later, by amendment of the restrictions, the set-back for lots adjoining the Criss lot (No. 14) was reduced to 25 feet, but it was not made applicable to the Criss lot.

The entire block immediately north of the Criss lot No. 14, is improved with residences and the same is true across Nuevo Avenue on the west side. These residences are all uniformly set back 25 feet from the front property line. The Crisses also later purchased lot 13, which is adjoining and to the north of lot 14, in block 59.

Mr. Criss testified that he purchased lot 14 from the Company through a Mr. McGregor, vice president (now deceased) and told him that he wanted lot 14 for business; that McGregor said: "That is for residence"; that he told McGregor that he could not use it unless he could use it for business only and that McGregor said: "Well, those restrictions can be waived," and were; that he bought the lot on contract, submitted plans and specifications to the Company, which were approved, and a building permit to erect a one-story frame stucco store building upon the east one-half of said lot 14, facing Merrill Avenue, was issued on August 30, 1938. This building permit is in evidence. Thereafter, the store building was thus erected and defendants have conducted a bakery and grocery store there ever since. A frail building for a vegetable stand was later placed on that lot, west of the store building, facing Merrill Avenue, occupying a space 80 feet by 36 feet. Plaintiff did not complain about this construction. The vegetable stand was later condemned by the health department.

Criss further testified that he then went to a Mr. Williams, another vice-president of the Company, to secure a "priority" to build a nice building on the remaining portion of lot 14; that Williams told him he could do nothing for him; that he then told the vice president that he was constructing a building and covering the balance of lot 14; that he had a blue print of it and would bring it up to him to examine; that he started to move away some of the dirt on the lot; that the Company told him it would be the end of the week before they would pass on or discuss the plans; that later, the Company told him there was nothing wrong with the building but that he "must set it back," and that "right there is where we tangled"; that he told the Company of McGregor's agreement with him but the Company told him that McGregor was dead and that he no longer was in charge of the Company.

The south side of Merrill Avenue is not in the townsite. Several store buildings occupy that property immediately across from defendant's property. The district surrounding defendant's property along Merrill Avenue is fastly developing into business property.

A Mr. Hasbrouck, agent for the company, testified "according to his best recollection," that Mr. Criss had already started the construction of the new building before he brought the plans and specifications to his office; that the plans for the building were not complete and did not show enough of the construction to allow him to issue a permit; that the principal objection to defendant's program was that he was building up to the property line of Nuevo Street and did not allow any set-back. On cross-examination he testified that certain FHA inspected houses, about 400 in number, had been built in the Fontana Townsite without the necessity of securing a permit for each house, and that certain small buildings of many kinds, and one large concrete block building, had been built without permits because there were no steps taken to enforce the provisions of the declaration; that he was not instructed to police the townsite for this purpose; that therefore a good many buildings "got by without getting permits".

During the trial, counsel for plaintiff offered to stipulate that the Fontana Farms Company would raise no objection to lot 14 being used for business purposes, providing that the "set-back is made and the permit obtained." This offer of stipulation was not accepted. Since this action was commenced the store building has been completed and is now occupied by tenants.

After trial, the court found that after the building was in process of construction defendants did submit to plaintiff a floor plan but no detailed specifications; that plaintiff has not waived nor abandoned any of the restrictions mentioned in the amended declaration, as set forth in the complaint, in reference to residential districts, set-backs or otherwise, or the enforcement of the same; that no physical conditions in the vicinity have rendered it unconscionable or oppressive in equity or otherwise to enforce requirements of any of the restrictions with this exception, that since all of the residences on the lots immediately north of defendant's property are set back only a distance of 25 feet from the property line, it would be unconscionable and oppressive to require defendants to set back the building on the Criss lot (14) a greater distance than 25 feet from the east boundary line of Nuevo Street. It is then found that it is fair and equitable to restrain defendants from building within 25 feet of said east boundary line of Nuevo Street and to require the "removal of any building or portion thereof on the Criss lot which is within 25 feet of said east boundary line."

From the facts found the trial court concluded (1) that defendants be *permanently* enjoined and restrained from erecting or constructing any building or part thereof within 25 feet of the east boundary line of Nuevo Street; (2) that defendants be *permanently* enjoined from hereafter erecting any building upon said lot 14, or any part thereof, unless plaintiff shall have first approved the architecture thereof and issued a written permit to construct same; (3) that defendants be required to forthwith tear down and remove from lot 14, the building situated on the westerly portion of said lot, which "building extends easterly from a point within ten feet of the easterly boundary line of said Nuevo Street, except such portion thereof, if any, as plaintiff may hereafter consent in writing may remain on said Criss land; and particularly but not exclusively to forthwith tear down, demolish and remove from said lot 14 any portion of said building situate within 25 feet of Nuevo Street, as delineated on said map."

The judgment, as entered, followed closely the wording of the conclusions as above related.

It is defendants' argument that the restrictions were not applicable and should not be enforced by reason of the physical condition of the land; that the contiguous land had so changed as to render it unconscionable and oppressive in equity to enforce the restrictive covenants in that the land had changed from a residential district to a business district; further, that plaintiff had knowingly permitted defendants to erect a business edifice upon said land; and that plaintiff waived and abandoned the right to enforce the restrictions in failing to enforce the restrictions in respect to others.

In this respect it is contended that the restrictive covenants, being in the nature of a contract between the parties, cannot be changed by the court, i. e., that the complaint seeks to restrain defendants from building within 40 feet of the front property line in accordance with the restrictive covenant applicable to lot 14; that the court nevertheless found that it would be unconscionable and inequitable to require them to set the building back 40 feet and by its judgment required them to set it back 25 feet in violation of the written restrictive covenant; that since the set-back for adjoining lots was reduced to 25 feet the 40-foot set-back applicable to the Criss lot was thereby entirely eliminated, citing Friesen v. City of Glendale, 209 Cal. 524, 288 P. 1080.

It is next contended that there is no sufficient evidence to support the finding that the restrictions as to a building permit and set-back were not waived and that they were enforceable by the Company; that the evidence conclusively shows a waiver of the restriction as to lot 14 and that by the actions and conduct of plaintiff in allowing defendants to build, under written permit, a store building on the easterly one-half of lot 14, that that lot was changed from a residential lot to a business lot, and that, therefore, it should be affected only by the restrictions relating to business lots

The lot in question was described as being within a "residence district," to which certain restrictions apply, and so far as the record is concerned, remain in effect, unless there is a waiver or change of those restrictions by the proper parties. The complaint alleges that lot 14 is in a "residence district" as defined in the amended declaration. The court found this allegation to be true. It also specifically found that there had been no waiver of the set-back restrictions set forth in the instruments under which the property was conveyed, but held that it would be inequitable to enforce it in its entirety and that it would be equitable to allow a partial enforcement as to 25 feet of the 40-foot set-back requirement.

The amended declaration specifically provides that "all property in said district shall be used for private residence purposes only," with exceptions not applicable to store buildings, and that all structures erected thereon shall be in accordance with the Company's building code. It also provides that only in such districts shall there be 40-foot set-backs. No such set-back restrictions are made applicable to the "combined residence and business district" or the "business district." Section 12 thereof further provides that the Company may "with the consent of the owners of ½ of the property in any district * * * affected thereby, change or modify such restrictions * * * covenants * * * and agreements as may be deemed wise and necessary except as above otherwise provided."

Under the amended declaration, Fontana Farms Company, at its option, was entitled to claim a forfeiture of title for any breach of restriction or covenant, or restrain, by injunction, any breach of them. No court of equity would have held that the corporation was entitled to claim forfeiture of defendants' title to lot 14 by reason of the original construction of a store building on the rear of that lot, which store building was built with the apparent consent and acquiescence of the plaintiff.

The evidence clearly shows that plaintiff would have been estopped from claiming such a forfeiture when it waived compliance with the restrictions applicable to a "residence district." In other words plaintiff, by its actions, endeavored to change or modify the agreement as to the character of that lot and its restrictions. By its actions it consented that said lot might be used for either residence or business purposes. This would bring it within the classification of "combined residence and business district" or "business district," and, under either classification, no restriction is made regarding set-backs.

[1] Plaintiff should now be estopped from claiming a breach of any restrictions as to lot 14 under the amended declaration pertaining to a "residence district" when by its actions it has, in effect, endeavored to change such lot classification from a "residence district" to a "combined residence and business district." The amended declaration provides specifically that the restrictive provisions referred to are "declared to be for the benefit of all of said lands (in the district) and shall inure to the benefit of * * * all * * * persons acquiring any interest in said property."

[2] No provision is made whereby plaintiff could have waived such restrictions or agreements for the other property owners in reference to the set-backs or character of the buildings that could be built in a residence district. However, it does provide that the Company may, *with the consent of the owners of one-half of the property in any district,* change or modify such restrictions, reservations and agreements as it may deem wise and necessary. Apparently, the Company had no consent of one-half of the property owners to the original construction of the store building on lot 14. It therefore stands in this position: It is telling defendants that it sold them lot 14, with the understanding that they could erect a store building thereon; that it approved the plans and specifications for its erection; and that it stood by and watched its completion and accepted defendants' money for the lot, knowing all the time that lot 14 was in a "residence district" and that no store buildings were permitted to be erected on that lot unless one-half of the property owners in the district and the plaintiff consented to a change in the restrictions and covenants set forth in the amended declaration. Furthermore, it failed to secure the consent of those property owners in its endeavor to change or modify the classification of that lot. Not acting in behalf of the other property owners, but alone, it is seeking an injunction enjoining defendants from using this lot without complying with the 40-foot set-back provisions applicable to a "residence district". Equity should not now come to the aid of plaintiff in its endeavor to enforce such set-back provisions.

[3] Restrictions in a deed of a lot expressly made for the benefit of other lots in the same tract are valid and enforceable by the owners of such other lots. Alderson v. Cutting, 163 Cal. 503, 126 P. 157, Ann.Cas.1914A 1. Whether defendants would be entitled to raise such an estoppel or waiver in an action instituted by the other property owners, is not before us. Those property owners are not parties to this action nor would they necessarily be bound by the judgment rendered by the trial court under the pleadings.

The finding that defendants did submit to plaintiff a floor plan of the building but no detailed specifications therefor, requires some consideration. Under the amended declaration, all buildings were to be constructed in accordance with the company's building code for the several prescribed districts after a building permit had been issued by the Company. The injunction requiring defendants to tear down the structure erected on the west one-half of lot 14, apparently was not predicated solely upon the failure of defendants first to obtain a building permit therefor, nor upon the ground that defendants erected the building without having the architecture thereof first approved by the plaintiff. If lot 14 is still in a "residence district," as implied by the pleadings and the findings of the court, then, under the amended declaration, plaintiff was not authorized to issue a permit to the lot owner to build a store building in that district, and accordingly, was not authorized to approve plans and specifications for such a store without changing the district or the covenants in the amended declaration, and this change or modification could only be brought about by obtaining the consent of one-half of the property owners.

The findings are not supported by the evidence and are inconsistent in themselves. In one paragraph it is found that there was a 40-foot set-back as to lot 14; that said lot was in a "residence district"; but it is then found that defendants must tear down and remove all of said building recently erected on lot 14 unless plaintiff consents in writing that all but 15 feet of it may remain. Under the amended declaration it was necessary to have the added consent of one-half of the property owners to any change in the character of the district.

[4] The judgment further recites that defendants shall be *permanently* enjoined from constructing any building upon lot 14 within 25 feet of the boundary line of Nuevo Street. This portion of the judgment is erroneous. Under the terms of the amended declaration, all restrictions, conditions, covenants and agreements contained therein expire as of January 1, 1947, unless extended for another ten years, as provided in the agreement. There is no evidence of such renewal. The injunction could not prohibit defendants from building a store building on lot 14 after January 1, 1947, unless a proper extension were obtained. Diederichsen v. Sutch, 47 Cal.App.2d 646, 118 P.2d 863.

Judgment reversed.

BARNARD, P. J., and MARKS, J., concur.

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77 Cal.App.2d 71

PEOPLE v. MACIAS.

Cr. 1972.

District Court of Appeal, Third District, California.

Nov. 30, 1946.

Hearing Denied Dec. 23, 1946.

1. Assault and battery 🔑78

Information charging that defendant committed an assault upon a named person with a deadly weapon, "to wit: a wooden club" was sufficient notwithstanding that it did not allege circumstances under which club was used and which allegedly made it deadly. Pen.Code, §§ 245, 952.

2. Criminal law 🔑1186(4)

Where there was ample evidence to sustain conviction of assault while armed with a deadly weapon without testimony of officer concerning defendant's admission that he struck victim, error in failing to instruct that evidence of oral admissions of a defendant must be received with caution was not prejudicial. Code Civ.Proc. § 2061, subd. 4; Pen.Code, § 245; Const. art. 6, § 4½.

3. Criminal law ⚿823(4)

In prosecution for assault while armed with a deadly weapon, complaint that particular instruction pertaining to assault with a deadly weapon was deficient was not meritorious in light of other instructions given at defendant's request which elaborated and correctly stated the law on matters complained of. Pen.Code, §§ 240, 245.

4. Criminal law ⚿761(11)

Instruction given on matter of criminal intent, in so far as it told jury to take into consideration in deciding question of intent all of the circumstances surrounding the commission of the crime and the mental condition of accused, did not amount to an invasion of province of jury by instructing that an offense had been committed.

5. Criminal law ⚿761(8)

In prosecution for assault while armed with a deadly weapon, instruction on implication of intent to use deadly weapon from manner of its use, in view of context, was not an invasion of province of jury by assuming that a deadly weapon was used. Pen.Code, § 245.

6. Criminal law ⚿822(1)

Instructions must be considered in relation to charge as a whole.

7. Criminal law ⚿829(3)

In prosecution for assault while armed with a deadly weapon, where court at defendant's request, instructed jury that whether or not instrument alleged to have been used was a deadly weapon was for jury and fully instructed jury on presumption of innocence, instructions given sufficiently covered subject so that it was not error to refuse an instruction to the effect that, as a matter of law, a club is not a deadly weapon. Pen.Code, §§ 245, 1096, 1096a.

8. Criminal law ⚿829(1)

The giving of instructions couched in varying language but embodying the same principle of law is unnecessary, and if the principle of law is once correctly stated, that is enough.

9. Criminal law ⚿814(1)

Where possible application to any of the evidence in case of requested instruction was so remote that the giving of such instruction would only have tended to confuse jury and it had no relation to issues, requested instruction was properly refused.

10. Criminal law ⚿1186(4)

In prosecution for assault while armed with a deadly weapon, instruction on the limitations of a police officer in using force to make an arrest without a warrant, even though not relevant, was not prejudicial to defendant. Pen.Code, § 245; Const. art. 6, § 4½.

11. Criminal law ⚿1172(1)

In prosecution of a tavern keeper for assault while armed with a deadly weapon, instruction was not prejudicial as implying that defendant was guilty of a wrong toward patron assaulted, where instruction was also capable of interpretation that defendant was justified in striking patron in exercise of duty of protecting other patrons. Pen.Code, § 245.

12. Criminal law ⚿824(3)

In prosecution for assault while armed with a deadly weapon on the theory that defendant struck victim with a club, where defendant's position was simply that he did not strike victim, failure of court to instruct jury of its own motion on included offenses was not prejudicial. Pen.Code, § 245.

13. Criminal law ⚿1186(4)

Cross-examination by district attorney of defendant's witness to bring out the fact that witness, at time of trial, was confined in county jail was not prejudicial misconduct in view of admonition of court to jury. Const. art. 6, § 4½.

14. Criminal law ⚿1186(4)

Reference by district attorney in argument to defendant's hotel as a "Mexican joint" was not prejudicial misconduct as implying that hotel was a disreputable place frequented by Mexicans, in view of testimony that all but three of defendant's patrons were Mexicans and fact that "joint" was used in slang sense as meaning a gathering place, a hang-out, or any establishment, resort or dwelling. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint".

15. Criminal law 🔑1158(1)

The conclusion of trial judge as to the probable effect of misconduct of district attorney when matter is presented to trial judge on a motion for a new trial will not be disturbed unless such conclusion is plainly wrong.

16. Criminal law 🔑1186(4)

A judgment of conviction will not be reversed for prejudicial misconduct where appellate court is unable to perceive that alleged misconduct had a material effect on determination of issues of fact or where it appears that effect thereof was unimportant or slight, and especially so, where guilt of accused has been established by clear and convincing evidence. Const. art. 6, § 4½.

17. Criminal law 🔑1159(2)

A court on appeal will not attempt to determine weight of evidence but will decide only whether upon face of evidence, it can be held that sufficient facts could not have been found by jury to warrant inference of guilt.

18. Criminal law 🔑1160

Before a verdict of a jury, which has been approved by trial court, can be set aside on appeal upon ground of insufficiency of evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in trial court.

19. Assault and battery 🔑92

Evidence authorized conviction of assault while armed with a deadly weapon. Pen.Code, § 245.

Appeal from Superior Court, Merced County; R. R. Sischo, Judge.

Leo Macias was convicted of an assault while armed with a deadly weapon and from the judgment of conviction and an order denying his motion for new trial, he appeals.

Affirmed.

Stephen P. Galvin, Sr., and Stephen P. Galvin, Jr., both of Merced, for appellant.

Robt. W. Kenny, Atty. Gen., James O. Reavis, Deputy Atty. Gen., and Claude H. Adams, of Merced, for respondent.

ADAMS, Presiding Justice.

In an information filed in Merced County, defendant Leo Macias was charged with a violation of section 245 of the Penal Code, it being alleged that said defendant, on October 30, 1945, committed an assault upon the person of J. R. Jackman, while armed with a deadly weapon, "to wit: a wooden club." A demurrer to the information, interposed by defendant, was overruled, and after trial by a jury he was convicted. A motion for a new trial, based on all of the statutory grounds, was denied, and defendant has appealed from both the judgment and the order denying a new trial.

Asserted grounds for reversal are that the trial court erred in overruling defendant's demurrer to the information, that it misdirected the jury in numerous respects, that the district attorney was guilty of prejudicial misconduct, and that the verdict is contrary to the evidence and the law.

The evidence establishes that defendant Macias was, on the date of the alleged offense, the proprietor of a saloon and hotel in Merced. About seven o'clock in the evening of October 30, 1945, J. R. Jackman and George Baker, who were working at the Merced Army Air Base, entered defendant's place of business—known as the Highway Hotel—where, as defendant said, he was entertaining "some of the boys who were going back to Mexico." Jackman was introduced to defendant by one Gomez, a Mexican laborer who also worked at the Air Base. Macias requested Jackman and Baker to bring Jerkovich, the foreman at the Air Base, to the Highway Hotel, saying he had some laborers available for work at the Air Base, whereupon Jackman and Baker left and returned about eight o'clock with Jerkovich and two other fellow workmen. According to the testimony of Jackman, some time after 10:30 Baker, who was drinking at the bar, knocked a bottle to the floor, and when he stooped to pick it up fell off a stool. Macias then remarked, "Another drunk," whereupon he and two other fellows threw Baker out. Jackman then walked to a table where Jerkovich was sitting and said that if Baker was not welcome he had rather go home. Thereupon Macias said "Another drunk"; that he did not like the "white sons-of-bitches" anyway, and to throw Jackman out. Jackman was then ejected by defendant and another, Macias saying, "We will finish them off." Outside a fight started between Baker, Jackman and a Mexican named Ayala. Macias emerged from the hotel and hit Jackman over the head with a wooden club, breaking the club and inflicting a wound which was described by a medical witness as a laceration on the top of the head that was about four inches long and quite deep, and looked as if it had been made by a blow, but not with a sharp instrument. After he was struck Jackman fled, whereupon defendant picked up one end of the broken club and ran after Jackman, following him several hundred feet to a point where Jackman sought refuge under a car in a parking lot. According to the testimony of the bartender, who was called as a witness for the defense, Macias did not go out when Jackman was ejected, but remained inside, the doors having been locked; but the witness saw fighting going on outside and called Macias' attention to it whereupon Macias telephoned to the police then grabbed the club, which was behind the bar, and went outside. According to Jackman, as he was being pursued by Macias the latter struck at him several times and said, "I will kill the son-of-a-bitch"; and while he was attempting to avoid attack by crawling under a parked car two police officers arrived, one of whom took charge of Macias and took the club away from him. One of these officers testified that he was assigned to investigate a row at the Highway Hotel, and as he approached the place saw Jackman being chased down the street by Macias who had a club in his hands; that he took the club away from Macias who said, "I will kill the son-of-a-bitch." He stated that blood was running down Jackman's face from a wound on his head and his shirt was bloody; that Jackman accused defendant of striking him and Macias admitted it; that they then went to the Highway Hotel with Macias and Jackman, where they found two or three persons standing around and Baker who was prostrate. The other officer stated that he saw defendant with a club in his hands pursuing Jackman, and about three feet behind him; that Jackman ran around a parked car with defendant after him, and crawled under the bumper; that Jackman was "bleeding terribly," that he was "a bloody mess" and that there was wet blood on the club; that after putting Macias and Jackman in the patrol car they went to the Highway Hotel where they found Baker—who was an Indian boy—lying on the ground, "passed out," and three or four fellows kicking at him. Baker testified that he went to the Highway Hotel with Jackman, as they were seeking a fellow employee by the name of Gomez; that they found Gomez who introduced them to Macias; that Macias asked for Jerkovich, saying he had some Mexican Nationals that he wanted to put to work; that he and Jackman then went after Jerkovich and returned about eight o'clock; that later he knocked a bottle of beer off the bar, whereupon Macias and a couple of other fellows—Mexicans—threw him out; that a few minutes later defendant and a "couple of guys" threw Jackman out, that several Mexicans followed and began fighting with him and Jackman; that he saw Macias with a club in his hands and saw him "swing at" Jackman; that after hitting the latter, defendant also hit Baker on the arm and hit a Mexican who was fighting him; that he did not remember much after that except that he was on the ground and they were kicking him.

Macias, testifying in his own behalf, asserted that Baker and Jackman were intoxicated, that Baker was making a disturbance and that it was Jerkovich and two other men who put him out; that Jackman, gritting his teeth, came up where Marcias was sitting, whereupon Jerkovich asked him to get out, which Jackman did; that a woman who worked for him then told him that there was a fight outside, whereupon he looked out the window, then called the police; that Jackman, Baker and Ayala were fighting and had "some sticks"; that he thought he would go out and see if he could stop the fight, so grabbed the club that he usually kept behind the bar in case he had to use it for "the right purposes," and went out; that Jackman was not there any more, but Baker was lying on the side of the curb and Ayala was pounding him with a stick—an iron bar; that he ordered Ayala to stop and when he did not he hit him over the shoulder and half the stick fell down; that Ayala said the other man had run away, so he picked up the stick and went after him; that he did not hit either Jackman or Baker. He also denied making the statements attributed to him. He admitted that he was 6 feet, 2 inches tall and weighed about 200 pounds. Jerkovich, called in rebuttal, denied that he put Jackman or Baker out.

One Henry Jordan, testifying for the defense, testified that he was present in the barroom and after Baker and Jackman had been put out and the door locked, the witness, Ayala and another person were about to leave when they encountered Baker and Jackman with iron bars in their hands; that Ayala grabbed Baker, but the witness ran upstairs onto a balcony, from which place he saw Jackman, Baker and Ayala wrestling over the bars; that Jackman hit Baker and Ayala and they fell down; that Ayala then hit Jackman with a bar; that Macias was not out there then; that when he came out Jackson was going down the street, and Ayala was hitting Baker across the head with a bar; that he saw defendant hit Ayala across the arm with the stick he held in his hand; that he did not see defendant hit Jackman.

One Lopez, the bartender for Macias, was also called for the defense, and testified that Baker knocked over some bottles of beer and that he fell to the floor and was then put out; that defendant was going to put him out, but the foreman (Jerkovich) said he would take care of him; that the foreman also put Jackman out, and the doors were again closed; that he heard noise outside, and the side door rattling, and later looked out the window and saw Jackman, Baker and Ayala fighting; that he called Mrs. Reyes to tell Macias that they were killing Ayala; that defendant went to the telephone and made a call, then grabbed a stick and went outside, while Lopez remained inside; that after about 10 minutes the police arrived, and they brought Ayala in with his face covered with blood, and with an iron stake in his hand; that he took the stake away from him and later gave it to the officers; that he did not see any blood on the stake nor get any on his hands. He denied that defendant put either Baker or Jackman out, or touched either of them.

Mrs. Reyes, who was a cook at the hotel, said she saw three men fighting outside—Baker, Jackman and Ayala—after the bartender called her; that she called to defendant who went to the telephone, then told the bartender to open the door for him and he went outside; that she did not see anything in his hand.

The iron spikes or bars which were mentioned by some of the witnesses had apparently been taken from the truck used by Jerkovich, which was parked just outside the hotel. Both Jackman and Baker denied having them in their possession at any time.

[1] Appellant's first assigned error is that the information was insufficient and that his demurrer thereto should have been sustained. The information read: "Leo Macias is accused by the District Attorney for the said County of Merced, State of California, by this Information of the crime of a felony, to wit: a violation of Section 245 of the Penal Code of the State of California, committed as follows: The said Leo Macias, on or about the 30th day of October, 1945, at and in the said County of Merced, and State of California, and prior to the filing of this Information, did wilfully and unlawfully commit an assault upon the person of another, to wit: J. R. Jackman with a deadly weapon to wit: a wooden club."

The statute involved is section 245 of the Penal Code which reads: "Every person who commits an assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury is punishable," etc. Appellant argues that a wooden club is not a deadly weapon as matter of law; and that there being no allegation concerning the manner in which the club was used in this case, the information was insufficient; that a club is a deadly weapon only under particular circumstances and that the information failed to allege any such circumstances.

Section 952 of the Penal Code, as it now reads, after amendment in 1927 and 1929, provides that in charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused.

In People v. Mitchell, 40 Cal.App.2d 204, 208–210, 104 P.2d 545, 548, the effect of the change in the language of said section 952 was discussed, and the court said that "It is now sufficient to plead the offense in the exact terms of the statute, and the accused is not entitled to a detailed allegation setting forth the particular circumstances. The accused is amply protected because he is legally entitled to a transcript of the testimony upon which the indictment or information is based." Also see People v. Pierce, 14 Cal.2d 639, 644–646, 96 P.2d 784; People v. De La Roi, 23 Cal.2d 692, 697, 146 P.2d 225, 151 P.2d 837; People v. Beesly, 119 Cal.App. 82, 84–86, 6 P.2d 114; People v. Silver, 75 Cal.App.2d 1, 170 P.2d 80. Even before the amendments to section 952, supra, it had been held that an information which charged an "Assault with a deadly weapon, to wit, a large shovel," was sufficient (People v. Weir, 10 Cal.App. 460, 102 P. 539); and in the Weir case the case of People v. Perales, 141 Cal. 581, 75 P. 170, relied upon by appellant herein, was distinguished. Also see People v. Savercool, 81 Cal. 650, 22 P. 856.

[2] Appellant's next contention is that the trial court erred in refusing to give an instruction on the subject of admissions, which was requested by him, and in giving one which, it is contended, is erroneous. The requested instruction reads: "An admission is the acknowledgment of the truth of some of the facts, constituting the alleged offense, and you are instructed that evidence of oral admissions of the Defendant must be received with caution." The one given states: "An admission is an acknowledgment of the truth of some facts constituting an alleged offense and, if you believe from the evidence in this case that the defendant has made some admission in this case tending to show his guilt of the offense charged, you may consider it as you would any other fact in the case and give it such weight as you deem proper."

Section 2061, subd. 4, of the Code of Civil Procedure provides that a jury is to be instructed by the court on all proper occasions that the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution. Appellant in his brief and in his argument before this court placed particular reliance upon People v. Koenig, —— Cal.App.2d ——, 164 P.2d 923, in which the failure of the trial court to give an instruction that the testimony of defendant's oral admissions ought to be viewed with caution, was held to be reversible error. But that case has now been decided by the Supreme Court which held that while such cautionary instruction should have been given, in view of the record it was improbable that had it been given the jury would have discounted the testimony of the police officers as to defendant's admissions to such an extent that it would have returned a different verdict. We are of that opinion about the case before us. There is ample evidence to sustain the verdict without the testimony of officer McDonald about defendant's admission that he struck Jackman. Jackman testified that defendant hit him over the head with the club, and it was obvious from Jackman's condition that he had been hit. Also there is evidence that there was fresh blood on the club, and it is not denied that defendant, with the club in his hand, pursued

Jackman when the latter sought to escape from the scene of his injury and to conceal himself from his pursuer. It is also conceded that defendant armed himself with the club which he said he kept behind the bar for the "right purposes," and went out. And in view of the evidence that he had previously stated that he did not like the "white sons-of-bitches" anyway, the jurors were fully justified in believing that it was Jackman whom he hit with his club, and not Ayala as he claimed. One of the officers also testified that when they reached the place where Jackman was attempting to conceal himself under the car fender, defendant said, "I will kill the son-of-a-bitch."

[3] Appellant next argues that the court misinstructed the jury on the principles of law pertaining to assault with a deadly weapon. The instruction given was:

"You are instructed, that an assault is an unlawful attempt, coupled with a present ability to commit a violent injury on the person of another.

"240 Penal Code.

"You are instructed, that in order to constitute the crime of assault with a deadly weapon, it is not necessary that the intended victim be seriously injured. The crime of assault with a deadly weapon may be committed without the intended victim having received any physical injury.

"If a person unlawfully attempts to strike another with a deadly weapon, and has a present ability to commit a violent injury on that person, the assault is completed.

"The unlawful attempt coupled with a present ability to commit a violent injury on the person of another constitutes the crime. In such a case the attempt has been made, coupled with a present ability to commit a violent injury within the meaning of the statute.

"It cannot be said that the ability to do the threatened act is wanting because the act was in some manner prevented.

"An assault cannot be made incomplete, merely because the intended victim resists and saves himself from injury or escapes."

Appellant's objections to this instruction are that it declares: That no physical injury need be shown, that the crime was committed although the complainant saved himself from injury or escaped, that the crime was committed though no blow was struck, and that it assumes that a club is a deadly weapon per se regardless of its use.

However, appellant fails to note other instructions given by the court at defendant's request, which read:

"I instruct you that whether the instrument alleged to have been used by the Defendant was or was not a deadly weapon is a matter of fact for you jurors to determine, and in determining whether or not an instrument is a deadly weapon you must take into consideration the manner of its use, the injuries inflicted by it, if any, the size and nature of the instrument and all the attendant circumstances."

"Every material element of the crime charged in the Information must be established beyond a reasonable doubt. In this particular charge there are three elements that must be proved by the Prosecution. These are:

"1. That the Defendant intended to assault the complaining witness, J. R. Jackman;

"2. That he did actually assault him;

"3. That he assaulted him with a deadly weapon;

"If any of these elements is not established to a moral certainty and beyond all reasonable doubt, you must acquit the Defendant."

In People v. McCoy, 25 Cal.2d 177, 190, 153 P.2d 315, 321, one of the charges against defendant was an assault with a deadly weapon, of which charge he was found guilty. While the weapon in the case was a knife, there was no evidence that he inflicted any knife wounds upon the complaining witness, but he did threaten her with it, holding it near her face after he had knocked her down. The court said that while a knife is not an inherently dangerous or deadly instrument as a matter of law, it may assume such characteristics, depending upon the manner in which it is used. It quoted from People v. Raleigh, 128 Cal. App. 105, 16 P.2d 752, to the effect that when it appears that an instrumentality which is not a "weapon" in the strict sense of the word "'Is capable of being used in a "dangerous or deadly" manner, and it *may be fairly inferred from the evidence that its possessor intended on a particular occasion to use it as a weapon should the circumstances require, we believe that its character as a "dangerous or deadly weapon" may be thus established, at least for the purposes of that occasion.*'" (Italics by the Supreme Court.) The court also said: "The trial court properly instructed the jury defining a deadly weapon (Pen.Code, § 245) and an assault in relation thereto (Pen.Code, § 240). In its charge on this phase of the case, the court stated that 'the intent or intention with which an act is done is manifest by the circumstances connected with the offense,' and it correlated therewith the 'present ability to commit a violent injury upon the person of another' as a matter for consideration in establishing the character of the instrumentality for the occasion in question. These were essential points for the jury's deliberation of the appellant's guilt of an assault with a deadly weapon. People v. Raleigh, supra, 128 Cal.App. at pages 109, 110, 16 P.2d 752. To warrant conviction of such offense it was not necessary that the prosecution introduce evidence to show that the appellant *actually made an attempt to strike or use the knife upon the person of the prosecutrix* (People v. Bird, 60 Cal. 7; People v. Hunter, 71 Cal.App. 315, 235 P. 67), and the court properly refused the appellant's request to so instruct the jury."

Also see People v. Freeman, 86 Cal.App. 374, 376, 260 P. 826; People v. Raleigh, supra; People v. Peak, 66 Cal.App.2d 894, 900, 153 P.2d 464.

[4] Appellant further insists that the trial court invaded the province of the jury by instructing that an offense had been committed, when it instructed them as follows:

"It is impossible, of course, to read a man's mind as you would a book and thus determine his intention. You will, therefore, take into consideration in deciding this question all of the circumstances surrounding the commission of the crime, and the mental condition of the accused; for the law says, that the intent is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused; but it also declares, that all persons are of sound mind who are neither idiots, lunatics, nor affected with insanity."

Appellant asserts that this instruction is a positive and unmistakable assumption and declaration that there was a "crime" and "an offense" committed; and that the jury therefore had no alternative but to convict. We think appellant reads more into the language of the court than is justified, and that the jury was not thereby instructed that defendant had committed a crime. See People v. Ramirez, 56 Cal. 533, 537, 38 Am.Rep. 73; People v. Besold, 154 Cal. 363, 369, 370, 97 P. 871; People v. Wilkins, 158 Cal. 530, 536, 111 P. 612.

[5, 6] Next, appellant charges that the court invaded the province of the jury by assuming in its instructions that a deadly weapon was used, because it said:

"You are instructed, that in the offense of assault with a deadly weapon, an intent to use the deadly instrument may be implied from the manner of its use.

"If the act is wrongful and the use of the instrument under the circumstances is unlawful, the intent may be inferred from the method used, including the position of the parties and all of the surrounding circumstances.

"Where the act is both unlawful and wrongful, and well calculated to inflict serious personal injury, the law will imply an unlawful intention and override any actual intention existing in the mind of the aggressor."

"I instruct you that in this case, if you are convinced from the evidence beyond all reasonable doubt and to a moral certainty, that the defendant, Leo Macias, on or about October 30, 1945, did wilfully and unlawfully commit an assault upon the person of J. R. Jackman with a deadly weapon or instrument, and that such instrument when used in such manner was likely to produce death or great bodily injury, your verdict should be guilty."

Appellant says that these two instructions make the express assumption that there was a deadly weapon. But here appellant falls into the error of separating the charge to the jury into separate portions and considering each portion without relation to the charge as a whole. When it is considered in its entirety we think that appellant's said contention is unjustified.

[7] Appellant's next assertion is that the court erred in refusing to instruct the jury that as a matter of law a club is not a deadly weapon, and that it should have given the following instruction proposed by defendant: "An instrument such as a stick or club is not a deadly weapon as a matter of law, and the presumption of innocence includes the presumption that it was not used as a deadly weapon. You must give the Defendant the benefit of this presumption." People v. Lee, 23 Cal.App.2d 168, 72 P.2d 572, is relied upon by appellant as authority for the requested instruction, but we find nothing in that opinion indicating that such an instruction was there given or requested. As hereinbefore stated, the court instructed the jury, at defendant's request, that whether or not the instrument alleged to have been used was a deadly weapon was a matter of fact for them to determine; also they were fully instructed on the presumption of innocence, in the language of section 1096 of the Penal Code. The instructions given sufficiently covered the subject. See Penal Code section 1096a.

[8] Appellant next urges that the court erred in refusing to instruct the jury on the effect of legal presumptions, and in failing to give the following instruction requested by him: "A presumption may be controverted by other evidence, direct or indirect, but unless so controverted the jury are bound to find according to the presumption. In this case the defendant, Leo Macias, is presumed to be innocent of any crime and you must give this presumption full weight throughout your deliberation." The jury was instructed regarding the presumption of innocence, in the language of section 1096 of the Penal Code. That was sufficient. The giving of instructions couched in varying language but embodying the same principle of law is unnecessary. If the principle of law is once correctly stated, that is enough. In People v. Kynette, 15 Cal.2d 731, 757, 104 P.2d 794, 807, it was said: "The first refused instruction concerned the presumption of innocence. This subject was adequately covered by the instruction given by the court, which followed the language of section 1096 of the Penal Code. Section 1096a of the same Code declares that no other instruction need be given on the subject." In People v. Lew Fat, 189 Cal. 242, 247, 207 P. 881, 883, the court said: "The next group of his requested instructions which the defendant claims should have been given refer to the presumption of innocence to the benefit of which the defendant was entitled throughout his trial and up to the moment of the determination by the jury of his guilt or innocence. But an examination of the instructions which the court gave discloses that it covered the entire matter of these instructions with a clear, concise, and correct charge. It was not required to repeat the rule in the more diffuse and amplified form of the defendant's requested instructions." Also see People v. Bickerstaff, 46 Cal.App. 764, 775, 190 P. 656; People v. Wolfgang, 192 Cal. 754, at page 763, 221 P. 907, at page 911, citing People v. Bickerstaff.

[9] Another alleged error is the refusal of the trial court to instruct the jury on the definition of burglary, and in refusing to instruct them that "any person who attempts to enter a building with intent to commit any felony is guilty of a felony." The refusal to give such an instruction was entirely justified. Its possible application to any of the evidence in the case is so remote that the giving of same would only have tended to confuse the jury; and it had no relation to the issues. The urging of such an alleged error as ground for reversal of the judgment only tends to render questionable the faith of appellant's counsel in the merits of defendant's appeal by multiplying alleged errors; and, as said by the court in United States v. Rowe, 2 Cir., 56 F.2d 747, 750, "set hurdles for the judge to leap." This one may be hurdled without further comment.

[10] Another assignment of error made by appellant is that the court erred in instructing the jury on the limitations of a police officer in using force to make an

arrest without a warrant, it being argued that since there was no arrest by the officers without a warrant the instruction could only have reference to the conduct of the defendant; and that the sole inference that the jury could draw was that defendant, as a private person, had even less justification in making an arrest or using force without a warrant than a police officer had. While we do not see that the instruction was relevant, appellant's conclusion is unwarranted, and we are satisfied that defendant suffered no injury by the giving of same.

[11] We are next importuned to reverse the judgment because of the alleged error of the court in instructing the jury on the duty of a tavern keeper to safeguard a guest. The instruction given reads: "You are instructed that a patron of a restaurant or a place of business where beer or liquor is sold, is an invitee of the owner of the business, and the law imposes, upon the owner of the business the duty of exercising ordinary care for the protection of the patron from injury." It is argued that this was prejudicial to defendant, as the rights of Jackman as a patron had no relevance to the question of assault, and its sole purpose was to imply to the jury that defendant was guilty of a wrong toward Jackman. Here, again, defendant over-emphasizes the importance of the instruction. Even assuming that it was superfluous, it was equally subject to an inference that defendant was justified in striking Jackman in the exercise of his duty as owner to the other patrons of his business, if, as defendant appears to be contending, they were being menaced or assaulted by Jackman.

[12] We are next urged to hold that the trial court committed reversible error in failing to instruct the jury of its own motion on included offenses, though appellant states that he did not request one and that his position throughout the trial was that the information was based on an alleged striking of Jackman with a club, and that defendant's position was simply that he did not strike Jackman. But he argues that the court, by other instructions given and previously discussed, raised the issue of simple assault and, therefore, should have submitted an instruction on it. This course of reasoning does not appeal to us as furnishing any ground for complaint. See People v. McCoy, supra, 25 Cal.2d at page 195, 153 P.2d at page 324, thereof.

[13] Finally, appellant contends that the district attorney was guilty of prejudicial misconduct for two reasons. The first was because in cross-examining defendant's witness Jordan the following occurred:

"Q. By the way, where do you live?

"Mr. Galvin Jr: Object to that as incompetent, irrelevant and immaterial.

"Mr. Adams: He asked him where he lived.

"The Court: Where the witness lives or where he was at that time? A. At that time?

"Mr. Adams: Now, where are you living now? A. Now in the County Jail now.

"Mr. Galvin Jr: I object to this and assign it as prejudicial misconduct, as definitely an intentional act on the part of the District Attorney.

"Mr. Adams: I can find out where he lives, it is cross-examination.

"The Court: Let it stand as it is.

"Mr. Galvin Jr: I will ask the Court to instruct the jury to disregard the testimony and admonish them that it has no bearing at all about the position of the defendant in this case.

"The Court: Well, of course, the jury will understand that,—

"Mr. Adams: It goes to his credibility.

"The Court: (continuing) the witness happens to be in jail has no bearing on this case.

"Mr. Galvin Jr: Counsel stated it goes to the credibility of this witness, that is absolutely false.

"The Court: The question of course will have to go out and the statement disregarded.

"Mr. Galvin Jr: Will the Court instruct the jury that it does not go to the credibility of the witness?

"The Court: No, it does not go to the credibility of the witness and should go out and should not be considered by the jury."

Subsequent questions developed the fact that Jordan had lived at the defendant's hotel for several weeks after the events charged in the information.

Appellant contends that the question asked by the district attorney was a deliberate attempt to degrade the witness and that the instruction of the court could not have had the effect of inducing the jury to disregard it; and that since the verdict is in conflict with Jordan's testimony, its rejection by the jury "is understandable only on the assumption that the witness was degraded in the jury's eyes by reason of the misconduct of the district attorney." In People v. Roeder, 41 Cal. App.2d 495, 501, 107 P.2d 92, 95, the court said regarding a similar contention: "The questions asked by the prosecution as to whether or not appellant slept in jails at San Diego and at Elsinore on the two nights prior to his return to San Bernardino in March of 1940 were not of sufficient importance to prejudicially affect appellant's substantial rights."

[14-16] In addition to the foregoing claimed misconduct on the part of the district attorney it is contended that in his closing argument the district attorney was also guilty of prejudicial misconduct because he said: "This is a Mexican joint, down there—* * * It was full of Mexicans that night and when these fellows were put out they were put out with this threat 'Let's finish them off.'" Appellant's counsel argues that the "whole connotation of the District Attorney's remarks were (sic) obviously that the Highway Hotel was a disreputable place because frequented by Mexicans." That the place was frequented by Mexicans cannot be said to have been a misstatement or an unjustified comment. Defendant's own testimony was that they were entertaining that evening for some of the boys that were going back to Mexico; and there was other testimony showing that those present were mainly Mexicans. In his cross-examination of Jackman appellant's counsel brought out the fact that the people in the room were Mexican Nationals, including Macias, and that there were 10 or 12 of them there. And Lopez, defendant's bartender, testified that besides Jerkovich and Jackman there was only one other American, the rest being Mexicans. But that fact could not in itself be said to cast a reflection upon the place. The only portion of the district attorney's statement which might be considered derogatory was the characterization of the place as a "joint." Webster's New International Dictionary defines "joint" used as slang as (a) "a gathering place; a hangout"; (b) "Loosely, any establishment, resort, dwelling, etc." As used in this sense we do not see that the remark of the district attorney was grossly improper or so far exceeded the realm of proper argument under the circumstances that it can be said to have prejudiced the rights of defendant. It must be obvious to any jury that district attorneys are not inclined to deal with defendants as paragons of virtue, and that counsel for defendants are accustomed to disparage witnesses for the prosecution. This case furnishes no exception, and we do not believe that the remark of the district attorney of which appellant complains can be said to have jeopardized the rights of defendant in view of the evidence in the case. See People v. Wiley, 33 Cal.App.2d 424, 427, 428, 91 P.2d 907; People v. Cherry, 30 Cal.App. 285, 158 P. 335; People v. Hahn, 58 Cal.App. 704, 709, 209 P. 268; People v. Reyes, 133 Cal.App. 574, 577, 24 P.2d 531; People v. Frost, 37 Cal.App. 120, 123, 174 P. 106; People v. Fontes, 110 Cal.App. 141, 143, 293 P. 835. Also, this contention of appellant was argued on motion for a new trial and overruled. In People v. Sarazzawski, 27 Cal.2d 7, 161 P.2d 934, the Supreme Court said that a trial judge is in a better position than an appellate court to determine the probable effect of misconduct of counsel, and his conclusion on that question will not be disturbed by an appellate court unless in the circumstances it is plainly wrong. And in People v. Rickman, 67 Cal.App.2d 711, 155 P.2d 374, 376, it was stated: "Fur-

thermore, the law is well settled that a judgment of conviction will not be reversed where the appellate court is unable to perceive that the alleged misconduct had a material effect on the determination of the issues of fact, or where it appears that the effect thereof was unimportant or slight; and especially is this true where as here the guilt of the accused has been established by clear and convincing evidence. In other words, a reversal is not warranted except in clear and extreme cases, and unless the misconduct is obviously so flagrant and prejudicial that in the opinion of the appellate court based on a review of the entire record, it has resulted in a miscarriage of justice. 8 Cal.Jur. p. 621; 4 Cal.Jur. 10 Yr.Supp. (1943) pp. 1006-1010."

[17, 18] Finally it is urged by appellant that the verdict is contrary to the evidence and contrary to law and resulted in a miscarriage of justice. In People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780, the court said that a court on appeal will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt; that it is the function of the jury in the first instance and of the trial court, after verdict, to determine what facts are established by the evidence, and that before the verdict of the jury which has been approved by the trial court can be set aside on appeal upon the ground of insufficiency of the evidence "It must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below."

[19] We cannot say that upon no hypothesis is there sufficient evidence to support the conclusions of the jury and the trial court. On the contrary, there is ample evidence to support such conclusions, and it was for the jury to determine what testimony it would believe and what it would reject. We have read the record carefully and it is our conclusion that such error as may have been committed did not interfere with the substantial rights of appellant or result in a miscarriage of justice. Under such circumstances, and particularly in view of the decision in People v. Koenig, supra, and the provisions of Art. VI, section 4½, of the Constitution, the judgment and the order denying a new trial should be, and they are hereby, affirmed.

PEEK and THOMPSON, JJ., concur.

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77 Cal.App.2d 153

In re LYLE'S GUARDIANSHIP.

LYLE v. ANGLO-CALIFORNIA NAT. BANK OF SAN FRANCISCO et al.

Civ. 13131.

District Court of Appeal, First District, Division 1, California.

Dec. 5, 1946.

1. Dismissal and nonsuit ⇨19(1)

Though pleading seeking affirmative relief within meaning of statutory rule that a plaintiff has a right to dismiss an action before submission of the case unless affirmative relief is prayed for by defendant in some appropriate form of pleading, is usually in the form of a cross-complaint, it is not the generally designated name of the pleading which controls, but whether affirmative relief is requested. Code Civ. Proc. § 581.

2. Dismissal and nonsuit ⇨19(1)

The delivery of a dismissal to clerk of court does not authorize the clerk to enter a dismissal of a petition or complaint if there is some pleading on file in opposition thereto which requests affirmative relief. Code Civ.Proc. § 581.

3. Dismissal and nonsuit ⇨27

If attorney's authorization to dismiss and record of pleadings leave in doubt whether affirmative relief is sought within meaning of statutory rule that a plaintiff has a right to dismiss an action before submission of the case unless affirmative relief is prayed for by defendant in some appropriate form of pleading, the authorization to dismiss is, in fact and in law, subject to judicial determination. Code Civ.Proc. § 581.

4. Trial ⚷9(1), 14

A court for good cause has discretion in the control and regulation of its calendar or docket, and it is permissible for good cause to delay a trial or hearing to a later date or to drop or strike a case from the calendar, to be restored on motion of one or more of the litigants or on the court's motion.

5. Dismissal and nonsuit ⚷39

Where a petition was filed seeking appointment of a guardian over incompetent, and thereafter another filed a petition praying for appointment of guardian for the incompetent, and the second petition was filed with the first petition and given the same court number, and thereafter attorney for one who filed first petition sought dismissal of that petition and court ordered the petition "Off Calendar", the order was not equivalent to a dismissal, since "Off Calendar" is not synonymous with "dismissal" but merely means a postponement.

See Words and Phrases, Permanent Edition, for all other definitions of "Off Calendar".

6. Pleading ⚷1

Courts have control of pleadings in a case until a valid final judgment is rendered.

7. Dismissal and nonsuit ⚷19(1)

Where friend of incompetent filed petition for appointment of himself as guardian of incompetent's estate and person, and thereafter, in same proceeding, cousin of incompetent filed petition for appointment of certain bank as guardian of incompetent's estate and for appointment of a suitable person as guardian of incompetent's person, friend of incompetent was not entitled to have proceeding dismissed, since cousin's petition sought "affirmative relief" within meaning of statute precluding dismissal. Code Civ.Proc. § 581; Probate Code, § 1461.

See Words and Phrases, Permanent Edition, for all other definitions of "Affirmative Relief".

8. Insane persons ⚷34

Court was not bound to appoint incompetent's friend who filed petition for appointment of himself as guardian of incompetent's estate and person, but could have named any person, persons or bank as guardian of the estate, if it appeared to be in the incompetent's best interest. Probate Code, § 1461.

* * *

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the guardianship of the person and estate of Annie Galloway Lyle, an incompetent person. From orders appointing the Anglo-California National Bank of San Francisco, as Guardian of the estate of Annie Galloway Lyle, and Charlotte Cunningham as guardian of the person, Annie Galloway Lyle, opposed by the guardians and William D. Galloway, appeals.

Orders affirmed.

See also Cal.App. 174 P.2d 910.

Joseph A. Brown and Reed M. Clarke, both of San Francisco, for appellant.

Carl E. Day, of San Francisco, for respondents.

WARD, Justice.

The notice of appeal herein sets forth "that the above-named alleged Incompetent, Annie Galloway Lyle, does hereby appeal from the Orders and each of them, made and entered by the above-entitled court, on the 11th day of December, 1945, appointing guardians of her Person and Estate and directing Issuance of Letters of Guardianship in said matter." The notice refers to the appointment of Charlotte Cunningham as guardian of the person of "Annie Galloway Lyle, an incompetent person," and the Anglo-California National Bank of San Francisco as the guardian of the incompetent's estate. Appellant refers to Annie Galloway Lyle as Dr. Lyle. In the interest of brevity appellant's designation will be adopted.

On November 7, 1945 there was filed by H. L. McAllister, as a friend, a verified petition seeking the appointment of a guardian over the person and estate of Dr. Lyle. Also, on the same date, a citation was issued directing Dr. Lyle to appear on November 16, 1945 to show cause why H. L. McAllister should not be appointed guardian of the person and estate of the alleged incompetent. On November 16, 1945, the date set for the hearing of the McAllister petition, William D. Galloway, a resident of the State of Pennsylvania, and a cousin of Dr. Lyle, filed an unverified petition praying that the Anglo-California National Bank of San Francisco be appointed guardian of the estate, and that a suitable person be appointed guardian of the person of Dr. Lyle. The Galloway petition was not treated as a separate proceeding but was filed with the McAllister petition and given the same court number, namely, Probate No. 101,214.

[1-3] On November 30, the attorney for petitioner McAllister, filed with the county clerk an authorization, dated November 26, 1945, to dismiss the McAllister petition. The general rule, as stated in Code of Civ.Proc., sec. 581, is that a plaintiff has a right to dismiss an action before the submission of the case unless affirmative relief is prayed for in some appropriate form of pleading. Most of the California cases assume that a pleading seeking affirmative relief is in the form of a cross-complaint, but it is not the generally designated name of the pleading which controls—the controlling factor is whether affirmative relief is requested. In Rodgers v. Parker, 136 Cal. 313, 68 P. 975, an answer to a cross-complaint prayed for affirmative relief; it was held that the cross-complaint could not be dismissed without the consent of the parties who had prayed for affirmative relief in the answer. Similarly, in Aten v. Aten, 69 Cal.App.2d 589, 159 P.2d 672, an action to cancel a property settlement agreement for declaratory relief, an answer, praying that plaintiff take nothing and averring that plaintiff had no title or interest in the property other than as provided in a certain contract was a sufficient request for affirmative relief to preclude plaintiff from dismissing the action as a matter of right. The delivery of a dismissal to the clerk of the court does not authorize the clerk to enter a dismissal of a petition or complaint if there is some pleading on file in opposition thereto which requests affirmative relief. If the attorney's authorization to dismiss, and the record of the pleadings, leave in doubt whether or not affirmative relief is sought, the entry of the authorization to dismiss is, in fact and in law, subject to judicial determination. In the present case the "authorization" was not entered by the clerk but referred to the trial judge and the matter assigned to a probate department. In the absence of a desire by the attorney for McAllister to proceed the court ordered the petition of H. L. McAllister "Off Calendar" and made no reference to the action numbered 101,214. By this procedure the probate court retained jurisdiction not only of the person, which is not controverted, but of the estate of the incompetent.

[4-6] Some suggestion has been made that the order "Off Calendar" is equivalent to a dismissal. That suggestion should be disposed of at this point. A court calendar is a list of causes awaiting hearing on motion or trial. 6 Words and Phrases, Perm. Ed., p. 9. The words "Court Calendar" are sometimes used in the sense of a court docket. There are well recognized classes of calendars, such as civil, criminal, probate, ordinary, summary, short cause, small claims, default, jury, trial by court, motion, law, equity, etc. The court for good cause has discretion in the control and regulation of its calendar or docket. (64 Corpus Juris, p. 46, §§ 26 et seq.) It is permissible for good cause to delay a trial or hearing to a later date or to drop or strike a case from the calendar, to be restored on motion of one or more of the litigants or on the court's own motion. "Off Calendar" is not synonymous with "dismissal." "Off" merely means a postponement whereas a "dismissal" in judicial procedure has reference to a cessation of consideration. Courts have control of pleadings in a case until a valid final judgment is rendered. (64 Corpus Juris, p. 48, sec. 30.)

In the present petition for guardianship the attorney who filed the petition on behalf of McAllister subsequently made a "special appearance" and objected to the court proceeding with the hearing on the ground that the court was without jurisdiction to proceed; that the authorization to dismiss covered the entire proceedings, including the Galloway petition. This appeal is not taken by McAllister but by the incompetent. In fairness to the attorneys it should be mentioned that in another proceeding filed in this court and assigned to this division it appears that the authorization to dismiss was filed owing to the "marked improvement" of Dr. Lyle.

All issues of fact joined in probate proceedings not specially provided by probate code procedure or by the Judicial Council, are subject to the rules of procedure in civil actions. (Probate Code, secs. 1230–1233.) Probate Code, sec. 1461 provides in part: "Any relative or friend may file a verified petition alleging that a person is insane or incompetent, and setting forth the names and residences, so far as they are known to the petitioner, of the relatives of the alleged insane or incompetent person within the second degree residing in this State; notice of the nature of the proceedings and of the time and place of the hearing shall be mailed at least five (5) days before such hearing date to each of such relatives. Any relative or friend of the alleged insane or incompetent person may appear *and oppose* the petition. Thereupon the clerk shall set the same for hearing by the court and issue a citation directed to said alleged insane or incompetent person setting forth the time and place of hearing so fixed by him." (Italics added.) No provision for the form of the opposition is made either under the old Code of Civ.Proc., sec. 1763 or under present Probate Code, sec. 1461, or by rule of the Judicial Council.

[7] Not until 1943 was the probate section 1461 amended authorizing "any relative or friend" to appear "and oppose the petition." The Galloway petition affects the same person and property upon which the McAllister petition was based. A direct issue was raised between the petitioners whether McAllister or a bank should be appointed guardian of the estate. Also, there was an issue raised as to whether McAllister or some one else should be appointed guardian of the person. There is no contention that the probate court lacked jurisdiction of the person. The Galloway petition prayed for affirmative relief and requested that the McAllister and Galloway petitions be heard concurrently to decide the issues involved. Under the circumstances, conflicting issues having been raised, the clerk of the court would not have the right to enter a dismissal.

In support of appellant's contention that the filing of the authorization to dismiss the McAllister petition divested the superior court of jurisdiction, several cases are cited, notably In re Estate of Cook, 205 Cal. 581, 271 P. 1083 and In re Estate of Knauft, 59 Cal.App. 536, 211 P. 29. These cases are disposed of by In re Estate of Raymond, 38 Cal.App.2d 305, 100 P.2d 1085, which involved the probate of a will contest rather than proceedings for the appointment of a guardian. In that case it was held that a proponent may not withdraw his personal interest in a will in such manner as to cause the proceedings to fail. It is pointed out that other parties have an interest which may not be denied by the desire of the proponent of the will. While based upon different provisions of the code, the rule is logically applicable to the facts in this case. In reference to the two cases cited by appellant herein, the court said (at pages 307, 308 of 38 Cal. App.2d, at page 1086 of 100 P.2d): "The decisions in [In re] Estate of Cook, 205 Cal. 581, 271 P. 1083, and [In re] Estate of Knauft, 59 Cal.App. 536, 211 P. 29, relied upon by appellant, are not determinative of the issue. In both of these cases contests had been filed and the contestants, who were in the position of plaintiffs, obtained dismissals of their contests, not under subdivision 1 of section 581, but under subdivision 4 of this section by directing motions to the court."

Appellant asserts that Galloway should be forced to proceed in a separate action. If this rule should be followed it might result in a multiplicity of actions. Separate petitions were filed and afterward heard at the same time in the guardianship of Josephine H. Crocker. In re Crocker's Estate, 174 Cal. 660, 163 P. 1015,

1016. No particular point is made of this procedure. It is not discussed as an unsettled issue but merely mentioned in the opinion. The court was content to state that "The only duty of the court is to select a proper person for a guardian." Probate Code, sec. 1461, provides for the hearing of a petition and all opposition thereto by relatives or friends. When opposition appears the court issues a citation and sets the matter for hearing.

[8] The probate court retained jurisdiction in every respect conferred by the filing of the McAllister petition. The court was not bound to appoint McAllister but could have named any person, persons or bank as guardian of the estate if it appeared to the court to be in the best interest of the incompetent. Matter of Coburn, 165 Cal. 202, 131 P. 352; In re Sullivan, 143 Cal. 462, 77 P. 153; In re Estate of Schulmeyer, 171 Cal. 340, 153 P. 233; In re Estate of Espinosa, 179 Cal. 189, 175 P. 896; Sullivan v. Dunne, 198 Cal. 183, 244 P. 343. Such an order could have been made whether the Galloway petition was or was not filed if it was for the best interest of the incompetent.

The Galloway petition was not verified. As the court retained jurisdiction, it is unnecessary to consider appellant's argument or the early citation In re Bundy, 44 Cal. App. 466, 186 P. 811, that the presentation of this unverified petition left the court without jurisdiction to proceed. In Board of Education of San Francisco Unified School Dist. v. Mulcahy, 50 Cal. App.2d 418, 423, 123 P.2d 114, 118, the court stated: "While it is true that in certain actions, such as to quiet title, and practically all special proceedings, the law requires the complaint or petition to be verified, it is the established rule that failure to do so constitutes only a defect in pleading not affecting the jurisdiction of the court, and which may be cured by amendment. Security Trust & Savings Bk. v. Fidelity & Deposit Co., 184 Cal. 173, 193 P. 102; Canadian Bank of Commerce v. Leale, 14 Cal.App. 307, 111 P. 759." See, also, Mullane v. Industrial Acc. Comm., 118 Cal.App. 283, 5 P.2d 483.

It would be futile to reverse the order appointing the respective guardians on this appeal. No claim is presented that an improper selection was made by the trial court. If Dr. Lyle is now competent, the superior court may make an appropriate order if presented with a petition for restoration to capacity. (Probate Code, secs. 1470–1472.)

This appeal is on the judgment roll and none of the evidence relating to the competency or incompetency of Dr. Lyle is before this court.

The orders and each of them made and entered on the 11th day of December 1945 appointing a guardian of the person and a guardian of the estate of Annie Galloway Lyle, and directing the issuance of letters of guardianship in the respective matters, are hereby affirmed.

PETERS, P. J., and SCHOTTKY, J., pro tem, concur.

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77 Cal.App.2d 159

In re LYLE'S GUARDIANSHIP.

LYLE v. ANGLO-CALIFORNIA NAT. BANK OF SAN FRANCISCO et al.

Civ. 13307.

District Court of Appeal, First District, Division 1, California.

Dec. 5, 1946.

1. Courts 🔑202(5)

In view of constitutional provision that Supreme Court shall have jurisdiction in all such probate matters as may be provided by law, the right of appeal in probate matter is purely statutory, and exists only in those cases in which it is given by statute. Const. art. 6, § 4.

2. Guardian and ward 🔑161

Statute which relates to administration of estates of decedents, and which expressly makes appealable, orders refusing to allow attorney fees, has no application to cases arising under that portion of Probate Code relating to guardian and ward. Probate Code, § 1240.

3. Guardian and ward ⚿13(8), 161

Statute providing that appeal may be taken to Supreme Court from order granting or revoking letters of guardianship, settling guardian's account, instructing or directing a guradian, or refusing to make any order mentioned in the statute, governs appeals arising under part of Probate Code relating to guardian and ward, and is exclusive. Probate Code, § 1630.

4. Appeal and error ⚿792

Where an appeal is made from a nonappealable order, the appeal may be dismissed by the appellate court on its own motion.

5. Insane persons ⚿33(2)

Superior Court's order denying incompetent's petition for allowance of attorney fees and costs from her estate for appeal to District Court of Appeal from orders appointing guardians of incompetent's estate and person and directing issuance of letters of guardianship was not appealable and appeal was dismissed by Court on its own motion, where question of incompetency was not contested and attorneys did not in fact represent incompetent on the trial. Probate Code, § 1630.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the guardianship of the person and estate of Annie Galloway Lyle, an incompetent person, wherein the Anglo-California National Bank of San Francisco, as guardian of the estate of Annie Galloway Lyle, and Charlotte Cunninghan, as guardian of the person of Annie Galloway Lyle, were appointed on the petition of William D. Galloway. From an order denying the petition of Annie Galloway Lyle for an allowance of attorney fees and costs from her estate for prosecution of an appeal to the District Court of Appeal, Annie Galloway Lyle appeals.

Appeal dismissed.

Joseph A. Brown and Reed M. Clarke, both of San Francisco, for appellant.

Carl E. Day and Frank J. Fontes, both of San Francisco, for respondents.

WARD, Justice.

This is an appeal from the order of the superior court denying the petition of appellant for an allowance of attorney fees and costs from her estate for the prosecution of an appeal designated as Cal.App., 174 P.2d 906. Appellant assumes that as she may appeal from the orders adjudging her incompetent, an allowance to finance this appeal may be ordered, and hence an order denying such allowance is appealable.

[1] The constitution provides that the Supreme Court shall have jurisdiction "In all such probate matters as may be provided by law." Const., art. VI, sec. 4. Hence, the right of appeal in probate matters is purely statutory, and exists only in those cases in which it is given by statute. In re Estate of Funkenstein, 170 Cal. 594, 150 P. 987.

Probate Code sec. 1630 provides: "An appeal may be taken to the supreme court from an order granting or revoking letters of guardianship; settling an account of a guardian; instructing or directing a guardian; or refusing to make any order heretofore mentioned in this section." The latter clause is of no assistance in the present matter as no provision exists in the code relative to orders for an allowance out of an alleged incompetent's estate to finance an appeal from the order declaring incompetency.

In Re Guardianship of Reser, 57 Cal. App.2d 935, 936, 135 P.2d 709, 710, the court said: "In Re Morro's Estate and Guardianship, 36 Cal.App.2d 623, 627, 98 P.2d 552, it was held that this section [Probate Code, sec. 1630] was exclusive and that an appeal would not lie from an order not mentioned in the section. The same rule has been uniformly followed in the construction of section 1240 of the Probate Code relating to appeals in probate matters. See 11A Cal.Jur. p. 204. In the Morro case the court said: (at page 627 of 36 Cal.App.2d [at] page 554 of 98 P.2d): 'The jurisdiction of an appellate court in probate matters extends only to such orders and judgments as are made appealable by the Probate Code. [In re] Walkerly's Estate, 94 Cal. 352, 29 P. 719. The provision that an appeal may be taken from a special order made after final judgment has no application to probate proceedings. In re Estate of Allen, 175 Cal. 356, 165 P. 1011. Even if the court acted in excess of its jurisdiction, a question we find unnecessary to determine, the nonappealable order of the court was not thereby made appealable. In re Seymour's Estate, 15 Cal.App. 287, 114 P. 1023.'"

In re Walkerly's Estate, 94 Cal. 352, 29 P. 719, held that an order denying a motion to vacate an order denying a petition of an executor for allowance of compensation for extraordinary services, and to restore the petition to the calendar, was not an appealable order as it was not mentioned in Code of Civil Procedure, sec. 963, subd. 3 (now Probate Code sec. 1630).

[2, 3] Some reference has been made by appellant to sec. 1240 of the Probate Code expressly making appealable orders refusing to allow attorney fees. That section appears in the part of the code relating to the "Administration of Estates of Decedents." That section has no application to cases arising under Division IV of the Probate Code relating to "Guardian and Ward." The governing section as to such appeals is sec. 1630. That section is exclusive.

[4, 5] Where an appeal is made from a non-appealable order, the appeal may be dismissed by the appellate court on its own motion. In re Wiard's Estate, 83 Cal 619, 24 P. 45; Collins v. Corse, 8 Cal.2d 123, 64 P.2d 137. In view of the conclusion reached it is not necessary to further consider whether the attorneys now appearing on this appeal for attorney fees,—the attorney who represented McAllister, and the attorney who has an authorization to represent the declared incompetent on appeal,—are, in law, authorized to prosecute this appeal. This case is not one from which an attorney appears on behalf of an alleged incompetent on the trial and then prosecutes an appeal (Matter of Moss, 120 Cal. 695, 53 P. 357), but it is an appeal from an order denying attorney fees to attorneys who did not, in fact, represent the incompetent on the trial. The alleged incompetent was not represented by any attorney on the trial.

The main factual question, namely, was Dr. Lyle an incompetent, is not contested. On the present record the appeal is dismissed.

PETERS, P. J., and SCHOTTKY, J., pro tem, concur.

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